S. HRG. 103–711

THE COPYRIGHT ROYALTY TRIBUNAL REFORM ACT OF 1993

HEARING

BEFORE THE

SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

S. 1346

TO AMEND TITLE 17, UNITED STATES CODE, TO ESTABLISH COPYRIGHT ARBITRATION ROYALTY PANELS TO REPLACE THE COPYRIGHT ROYALTY TRIBUNAL, AND FOR OTHER PURPOSES

OCTOBER 5, 1993

Serial No. J–103–30

Printed for the use of the Committee on the Judiciary

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THE COPYRIGHT ROYALTY TRIBUNAL REFORM ACT OF 1993

TUESDAY, OCTOBER 5, 1993

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:08 a.m. in room 226, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the subcommittee) presiding.

Also present: Senator Grassley.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I am not the chairman of the subcommittee, as you obviously know but Senator DeConcini has been momentarily delayed. Through his staff he said that any member who wanted to start the hearing may start and I am very happy to do that for my friend, the Senator from Arizona.

I want to thank the chairman for holding this hearing on the very important issue before us. And of course, I want to thank the witnesses for taking time to meet with the subcommittee today on what is an extremely important issue for them.

Today, Chairman DeConcini has convened the subcommittee to hear about proposed legislation to eliminate the Copyright Royalty Tribunal. It is unusual here in Washington for us to consider abolishing any Federal agency, whether it be this one or any other one, and particularly it might be strange for one as small as the CRT. So in this environment this is a significant matter.

The CRT was established in 1976 to deal with the compulsory license provisions of the 1976 Copyright Act. It will also distribute royalties under last year's Digital-Audio Home Recording Act.

The issue for us is whether the function of the CRT can be better handled by the Library of Congress and by private arbitration panels. I look forward to hearing from today's witnesses, the CRT Commissioners who can tell us about the current workload of the CRT, as well as the people from the Library of Congress who can tell us what the transfer of work to the Library will mean.

I yield the floor.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Thank you, Senator Grassley, for starting the hearing. I apologize for being late.

Senator GRASSLEY. It took me 1 hour and 20 minutes to come in yesterday.

Senator DECONCINI. So I appreciate your starting this hearing and I appreciate the patience of the witnesses.

Today, as the Senator said, we will conduct hearings on S. 1346, the Copyright Royalty Tribunal Reform Act of 1993. I introduced this bill, along with the ranking member, Senator Hatch, to eliminate the Copyright Royalty Tribunal and to replace it with ad hoc arbitration panel for the purpose of setting rates and distributing funds that are collected under the compulsory licenses in the Copyright Act.

This bill places this arbitration function under the direction of the Librarian of Congress who, in addition to convening necessary arbitration panels, will provide the institutional continuity regarding the law, procedures, and process to the arbitration panel.

I don't believe there is an organization that is more prepared to assume these duties than the Library of Congress. The library, through the copyright office, has demonstrated a wealth of knowledge with respect to the copyright compulsory license. The Copyright Office has considerable expertise in the area of satellite and cable licenses; this expertise was evidenced by the study that they prepared for me last year that received widespread acclaim from all the interested parties in this very technical area.

So today we are pleased to have Mr. Mulhollan, the Deputy Librarian. I understand that Mr. Billington could not be with us. We appreciate your testimony, as well as Mary Levering, the Acting Register of Copyrights.

So we will turn it over to you, Mr. Mulhollan.

STATEMENT OF DANIEL MULHOLLAN, DEPUTY LIBRARIAN, LIBRARY OF CONGRESS, WASHINGTON, DC; ACCOMPANIED BY MARY LEVERING, ACTING REGISTER OF COPYRIGHTS

Mr. MULHOLLAN. Thank you very much, Mr. Chairman, Mr. Grassley. I wish to thank you for the opportunity to be here today to express the views of the Library of Congress on the Copyright Royalty Tribunal Act of 1993.

As you mentioned, sir, Dr. Billington asked me to convey his regrets that a physical illness prevents his being here. We went over the items that we are presenting to you in detail, as evidenced in the written statement which we submitted.

Senate bill 1346 represents a significant new direction in the administration of the compulsory licenses of the Copyright Act. With your assistance in resolving certain financial matters, which I will shortly address, we believe that the new responsibilities placed on the Library of Congress and the Copyright Office can be handled in an efficient and effective manner, to the satisfaction of all parties.

Following my remarks Mary Levering, who is acting for the Register of Copyrights through the end of the year, will comment on a few substantive points.

Mr. Chairman, the Library of Congress and the Copyright Office are ready to execute these new responsibilities and appreciate the trust which you have placed in us to do the job. The Library and the Copyright Office have always been ready to meet the chal-

lenges posed by change. We are prepared to assist Congress whenever policy dictates a new direction. We are confident that our staff will work expeditiously to implement any new responsibility you see fit to assign.

There is, however, a significant concern with respect to the finances to meet the task, a concern which can be resolved with some small amendments to the bill. The librarian's written statement fully develops these areas and includes proposed statutory language.

To summarize, we are concerned with the Library's and the Copyright Office's ability to deduct costs from the royalty pool, and the budgeting of our new duties for fiscal year 1994 and in future years. In administering the compulsory licenses, the Copyright Office is currently allowed by statute to deduct its costs from the royalty pools for the cable, satellite carrier, and audio home recording licenses. These costs include the collection of royalties and examination and processing of statements of account. No similar provision, however, is made in S. 1346 for the new responsibilities of the Copyright Office. The general provision allowing the panels to assess costs to the parties will not cover all our costs. For example, the cost of reviewing the panel's reports; receipt and processing of royalty claims and ratemaking petitions; implementation of regulations; procedural and evidentiary rulings required by section 801(c); and disbursement of monies will all have to be borne by the Library and the Copyright Office, and ultimately the taxpayer, unless the bill is amended.

We therefore strongly recommend that the bill be amended to allow the Library of Congress and the Copyright Office to deduct their reasonable costs from the royalty pools or, in the absence of a royalty pool as in the cases of section 116 and 118 in ratemaking, that, like the arbitration panels, we have authority to assess the reasonable costs to the parties.

Another strong concern is how the Library will finance the duties imposed by S. 1346 in the current fiscal year. There is no Library or Copyright Office budgetary appropriation for fiscal year 1994 for these duties. In order to alleviate these serious financial problems, we ask for two other critical amendments.

First, we ask that the bill be amended to allow the Library to assume the budget appropriation for the Copyright Royalty Tribunal for fiscal year 1994, which has already been approved by the Congress. The CRT will be allowed to use its appropriated funds to finish its work, and the remainder will be transferred to the Library.

Second, we ask that the positions required by the Library and the Copyright Office to carry out the functions and duties of S. 1346 be exempted from Public Law 103–69. This will allow the Library to obtain the necessary personnel and resources to implement the bill effectively.

While we understand that these are difficult budgetary times, and the charge is to do more with less, we feel that this exemption and the transfer of the CRT's already-appropriated budget are fundamental to the successful completion of our task.

These amendments are consistent with your apparent attempt to have the parties to arbitration proceedings bear all their reasonable costs.

Mr. Chairman, we look forward to the challenges of S. 1346. With our budgetary concerns resolved, we believe that we can meet the obligations of the bill in an effective and efficient manner that will be more than satisfactory to all the parties involved.

Now Mary Levering will address a few substantive points. I thank you.

Senator DECONCINI. Thank you.

Ms. Levering, we are very pleased to have you here as the Acting Register of Copyrights. If you have a statement, you may proceed.

STATEMENT OF MARY LEVERING

Ms. LEVERING. Thank you very much. Good morning, Mr. Chairman, Mr. Grassley. Thank you for the opportunity to appear here today and express the views of the Copyright Office on the Copyright Royalty Tribunal Act of 1993.

Senate bill 1346 proposes to eliminate a separate and independent Government agency, the Copyright Royalty Tribunal, which has been in existence since 1978 following the enactment of the Copyright Act of 1976. The Tribunal has distributed royalties collected by the Copyright Office for the compulsory copyright licenses, as well as set the applicable royalty rates.

The bill now would transfer these responsibilities to the copyright arbitration royalty panels, modeled after the panel which met last year under section 119, satellite carrier compulsory license, which set new satellite royalty rates.

The Library and the Copyright Office are given a considerable number of new duties to aid and support these panels in the distribution and ratemaking process. Included in these responsibilities are receipt and processing of well over 1,000 royalty claims annually; adoption and implementation of governing regulations and procedures; procedural and evidentiary rulings, as directed by the bill, prior to convocation of the arbitration panels; convocation of the panels; and aid and support of their operations, both legal and financial; legal review of the panels' reports and decisions; and partial and full distribution of royalties.

In the librarian's written statement we have noted some points for further consideration. I will highlight a few of them, in addition to the financial concerns already outlined by Mr. Mulhollan.

First, the bill amends section 111(d)(2) of the cable compulsory license by striking the second and third sentences and inserting new language, but the problem with the new language is that it omits the copyright owner's specific entitlement to the interest which has been earned on royalties deposited in the interest-bearing accounts by the Copyright Office. We recommend that you consider reinstating this language.

The second concern has to do with participation in panel proceedings. The bill currently provides that copyright owners claiming to be entitled to cable or satellite royalties, and any interested copyright party claiming audio-home recording royalties, may submit relevant information and proposals to the arbitration panels in proceedings applicable to such copyright owner or interested party.

But the bill is not clear as to whether these submissions may be made in distribution proceedings only, or ratemaking proceedings as well. We suggest that the bill be amended to apply the language to both ratemaking and distribution proceedings.

Also, there is no provision made for submissions by parties other than copyright owners and interested chapter 10 copyright parties. Thus, for example, in a cable ratemaking proceeding, cable operators who are not also copyright owners would apparently not be entitled to make an submissions of relevant information to the arbitration panel. We believe this result may be unintended, since cable operators would have a strong interest in a cable ratemaking proceeding, and we suggest the bill be amended to allow any interested copyright party to participate in a ratemaking proceeding and submit relevant information and proposals to the arbitration panels.

It may be advisable to define this phrase for purposes of section 111 and 119 ratemaking. Further thought should probably be given to the different interests that should participate in a ratemaking proceeding in contrast to a distribution proceeding.

A third concern involves the public or private nature of the proceedings. The bill is silent as to the nature of the proceedings before the panels and among the panel members; for example, whether they are public or private. The CRT currently operates in accordance with the Government in the Sunshine Act, so that all tribunal meetings are public. The bill could be amended to clarify that the proceedings are either public or private, or the Copyright Office could be directed to adopt appropriate regulations.

A fourth concern represents the public broadcasting license, the ratemaking dates. Technical adjustment may be necessary with respect to periodic review of rates under the public broadcasting license of section 118. The bill eliminates subsection 118(c), which sets the schedule for periodic review of the 118 license rates. We request clarification, whether it is intended not to have periodic review of 118 license rates. If there is no periodic review, there would be a number of other questions that would need to be answered; we have outlined these in the written statement.

We tentatively recommend reinstatement of the provision for periodic review.

A fifth concern is the phase-out of the ongoing proceedings. The act is set to take effect on January 1, 1994. On that date, the CRT would cease to exist and its workload would shift to the Library and the Copyright Office. The Tribunal is currently involved in several ongoing proceedings, most significantly the distribution of the 1990 cable royalties. It appears that the CRT may not be able to complete hearings and issue a decision before its dissolution on December 31 of this year. If that were to happen, the question arises about phase-out of the ongoing proceedings.

One alternative would be that the Library would have to immediately convene an arbitration panel during the first of the year to review and examine the same testimony previously presented to the CRT—perhaps, and probably, supplemented by other evidence. However, this would result in substantial added costs and duplication to the involved parties.

We therefore suggest consideration of a phase-out to allow the Tribunal and the present Commissioners to complete the unfinished business. Perhaps the bill could be amended to provide that any controversies or ratemaking commenced prior to a certain date would be completed by the CRT as of a specified date.

We are flexible on the dates, but suggest that the CRT could be allowed to complete any proceedings commenced prior to October 1, with an ending date of March 31, 1994. All other duties of the Tribunal would still move to the Library as of January 1, 1994.

We realize that the status of the Commissioners may have to be clarified by the legislation if this alternative is at all feasible.

A sixth concern relates to the time limit on conclusion of proceedings. Subsection (e) of the new section 804 retains the 1-year time limit of existing law for conclusion of CRT proceedings. This provision seems inconsistent with the 8-month time schedule set by subsections (d) and (e) of new section 802. We suggest clarification of this point, presumably by deletion of the 1-year provision in 804(e).

We have also noted a few other technical matters, errors in section or paragraph designations, that we will be pleased to share with your staff.

Mr. Chairman, Mr. Grassley, the staff of the Library of Congress and the Copyright Office are ready to work expeditiously to implement any new responsibility that the Congress sees fit to assign. With our financial, budgetary, and staffing concerns met by the proposed amendments, we would be able to meet the needs of both the copyright owners and users alike in the efficient execution of the full responsibilities of the copyright compulsory licenses without adding to the costs borne by the general taxpayer.

Thank you for your confidence in the Library of Congress and the Copyright Office.

[The prepared statement of Mr. Billington follows:]

PREPARED STATEMENT OF DR. JAMES BILLINGTON ON BEHALF OF THE LIBRARIAN OF CONGRESS

SUMMARY

The Copyright Royalty Tribunal Reform Act of 1993, S. 1346, would eliminate the Copyright Royalty Tribunal (CRT) and transfer its function and duties to the Library of Congress and the Copyright Office; with the recommendation of the Register of Copyrights, the Librarian would appoint and convene copyright royalty panels. These panels would administer royalty distributions and ratemakings for the cable and satellite carrier compulsory licenses and the Audio Home Recording Act. They would also be responsible for the setting of new rates for the public broadcasting compulsory license, the mechanical license and possibly the jukebox compulsory license.

Section 802 of the bill establishes the composition and proceedings of the copyright arbitration royalty panels; it is formatted after the arbitration process appearing in section 119(c)(3) of the satellite carrier compulsory license. Once the arbitration panel has issued a report, the Librarian with the recommendation of the Register of Copyrights has 60 days either to accept or reject the panel's decision. The final decision may then be appealed directly to the Court of Appeals.

The bill expressly carries over the royalty rates in effect on the date the bill is enacted subject to future changes by copyright arbitration royalty panels in accordance with schedules presently set in the Copyright Act.

As drafted S. 1346 only allows the arbitration panels to assess costs to the parties. It does not expressly allow the Library to deduct from the royalty pools the costs involved in implementing the new procedures or the post-arbitration review costs. The Library anticipates that the new responsibilities will generate significant costs. Although some of the pre-decision costs in support of the panels probably could be

charged to the parties, it is not clear under the bill that the Library could recover rulemaking and post-arbitration costs. If the Library is not allowed to deduct those reasonable costs from the royalty pools, then ultimately the taxpayer will pay. We suggest an amendment to clarify that the Library can recover all reasonable costs incurred in administering these new responsibilities.

The Library has some concerns about the transitional period and a few other technical suggestions.

The Library of Congress and the Copyright Office are ready to assume the duties and responsibilities of S. 1346 and administer it as effectively and efficiently as possible. With amendments that address our financial and budgetary concerns, we will be able to meet the needs of both copyright owners and users in undertaking these new duties.

Mr. Chairman and members of the Subcommittee, I wish to thank you and your staff for the opportunity to appear here today to testify on S. 1346, the Copyright Royalty Tribunal Reform Act of 1993. The Library of Congress and the Copyright Office have always been ready to meet the challenges posed by change. We are prepared to assist Congress whenever policy dictates a new direction. We are confident that our staff will work expeditiously to implement any new responsibility you see fit to assign.

Your bill, Mr. Chairman and Senator Hatch, will eliminate the Copyright Royalty Tribunal (CRT) and transfer its functions and duties to the Library of Congress and the Copyright Office, with royalty distributions and ratemakings to be administered through arbitration panels. A similar bill, H.R. 2840, has been introduced in the House of Representatives and has been marked up by the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary.

I. ANALYSIS OF THE BILL

S. 1346 vests the Library of Congress and the Copyright Office with a considerable number of new responsibilities for the statutory compulsory licenses. New section 801 of the Copyright Act would direct the Librarian, with the recommendation of the Register of Copyrights, to appoint and convene copyright arbitration panels for the purposes of adjusting the rates and distributing the royalties collected pursuant to the cable and satellite carrier compulsory licenses and the Audio Home Recording Act. The panels would also set new rates in a timely fashion for the public broadcasting compulsory license, the mechanical license and, possibly, the jukebox compulsory license.[1] The section also grants the Library authority to make any necessary procedural or evidentiary rulings in aid of the proceedings subject to arbitration.

New section 802 establishes the composition and proceedings of the copyright arbitration royalty panels. The format of the arbitration panels is patterned after the arbitration process appearing in section 119(c)(3) of the satellite carrier compulsory license. (The current satellite royalty rates were set in an arbitration proceeding conducted last year.) For each panel, either to establish royalty rates or distribute royalties pursuant to one of the compulsory licenses, the Librarian, with the recommendation of the Register of Copyrights, selects two arbitrators from a list provided by the parties to the proceeding. The Librarian is given 10 days from publication of notice (presumably in the Federal Register, although the bill does not so provide) of the initiation of the proceeding to select the two arbitrators. Unlike the satellite carrier arbitration panel, the arbitrators need not be registered with the American Arbitration Association.[2] However, like the satellite license panel, the two arbitrators select the third arbitrator who serves as the chairperson of the proceedings. If the two arbitrators cannot agree as to the third, the Librarian is directed to make the selection.

Once an arbitration panel is convened, it has 180 days from publication of the notice of the initiation of the proceeding to report its determination as to either the royalty rate or distribution which was the subject of the proceeding. During this 180 day period, the panel is charged with creating a fully documented written record, as well as acting on the basis of precedent established by the CRT, prior arbitration panels, and the actions of the Librarian. The bill provides that any copyright owner who claims to be entitled to cable and satellite royalties and any "interested party"

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[1] The jukebox compulsory license is currently suspended until the year 2000 and royalties are being paid through private voluntary agreement. Arbitration may be necessary at that time, or if the voluntary agreement is terminated prior to 2000.

[2] *See* 56 FR 67601 (1991).

claiming to be entitled to audio home recording royalties "may submit relevant information and proposals to the arbitration panels in proceedings applicable to such copyright owner or interested copyright party." The bill is not clear as to whether these submissions may be made in distribution proceedings only, or ratemaking proceedings as well. Furthermore, non-copyright owners (e.g., cable interests and public broadcasters) are not afforded the opportunity to make such submissions in the ratemaking proceedings in which they would participate. Such parties, however, would still have to share in the costs of the proceedings with the other parties "in such manner and proportion as the arbitration panels shall direct."

Upon receipt of the report of the arbitration panel, the Librarian, with the recommendation of the Register of Copyrights, has 60 days either to accept or reject the decision. Review is conducted on the basis of the "arbitrary" standard. If the Librarian rejects the report, he/she must substitute his/her own decision either setting the royalty rate or the distribution of royalties. The total time period from initiation of the proceedings to final decision is eight months. The final decision may be appealed directly to the Court of Appeals for the District of Columbia Circuit within 30 days of its publication in the Federal Register.

S. 1346 repeals current section 803 of the Copyright Act, which authorizes the CRT to issue regulations governing its operations, and makes significant changes to section 804 of the Act involving adjustments in royalty rates. The royalty rates in effect on the effective date of the bill are expressly carried over, subject to future changes by copyright arbitration royalty panels in accordance with the set schedules presently in the Copyright Act. Any "owner or user of a copyrighted work whose royalty rates are specified by this title" may file a petition for adjustment of the applicable royalty rate with the Librarian in accordance with the set schedules. The Librarian, upon recommendation of the Register of Copyrights, is to make a determination as to whether the petitioner has a significant interest in the royalty rate in which an adjustment is requested and, if so, convene an arbitration panel for such purpose.

Although ratemaking proceedings are subject to the general procedures of the arbitration panels, the bill provides specific direction for several of the compulsory licenses. With respect to the jukebox compulsory license, which is currently suspended until the year 2000 pursuant to a privately negotiated license, the Librarian is directed to convene an arbitration panel to set a jukebox rate in the event that the negotiated license is terminated or expires and is not replaced by another voluntary agreement. The arbitration panel is directed immediately to establish an interim rate, which is to be the same as the rate from the expired or terminated negotiated license, until the conclusion of the proceedings setting the new rate. The new rate will remain in effect until it is superseded by a new negotiated license.

The Librarian is also directed to convene an arbitration panel for setting royalty rates for the section 118 public broadcasting compulsory license absent negotiated licenses. If the rate-setting panel is convened, the new rates established by the panel shall be binding on all copyright owners, "regardless of whether such copyright owners have submitted proposals to the Librarian of Congress." The bill also makes clear that the royalty rates for the section 119 satellite carrier compulsory license are the ones "established by the Copyright Royalty Tribunal on May 1, 1992, as corrected on May 18, 1992." These are the royalty rates which were established by the arbitration procedure of section 119(c) last year and which serves as the model for the arbitration panels created by S. 1346.

II. OBSERVATIONS AND RECOMMENDATIONS

Mr. Chairman, the Library of Congress and the Copyright Office stand ready to assume the duties and responsibilities of S. 1346, and will administer the entire process in the most efficient way possible. The Library and the Copyright Office are appreciative of the trust involved in giving us the responsibilities of assisting with the ratemaking and distribution of copyright royalties for the compulsory licenses. We will do our best to guarantee that your trust was properly placed.

There are a few concerns and suggestions which I wish to express at this time. First, and foremost, is the assignment of costs.

Deduction of costs in general

S. 1346 only allows the arbitration panels to assess their costs to the parties and does not expressly allow the Library to deduct from the royalty pools the costs involved in implementing the new procedures or the post-arbitration review costs. Deduction of the Copyright Office's costs from the royalty pools, which is expressly provided for in the cable and satellite licenses and the Audio Home Recording Act, has been a critical factor in allowing the Copyright Office to collect royalties and exam-

ine statements of account as well as provide financial and technical information to the CRT for all the compulsory licenses. We anticipate that the new responsibilities placed on the Library by S. 1346 will generate significant costs. These costs include, but are not limited to: receipt and processing of royalty claims and ratemaking petitions; rulemakings and implementation of procedures and policies; procedural and evidentiary rulings as required by section 801(c) of the bill; examination of reports of the arbitration panels; operational, financial and technical assistance to the arbitration panels; distribution and partial distribution of royalties to copyright owners. Although some of the pre-decision costs in support of the arbitration panels could presumably be recovered by direct charge to the parties, it is not at all clear that the Library could assess rulemaking costs, for example, and post-arbitration costs to the parties. If the Library is not allowed to deduct these reasonable costs from the royalty pools, as the CRT has for the most part done in the past, then the costs would have to be borne solely by the Library and, ultimately, the taxpayers. It should be remembered that royalty distribution is essentially a clearinghouse function performed on behalf of the users and owners to save them the transactional costs of negotiation. It is only proper that they, not the taxpayers, pay the cost of such a service. Absorption of the costs by the Library, with its declining budget, is not realistic. It would only result in sacrifices in other areas that would be unfair to the taxpayers.

In order to allow the Library properly to deduct the costs associated with the new procedures, we suggest that section 802, as amended by the bill, should be further amended in paragraph (e) "Action by Librarian of Congress" to add the following sentence at the end:

> The Librarian of Congress and the Register of Copyrights are entitled to deduct from the royalty fees before their disbursement to any copyright claimants the reasonable costs incurred by the Library of Congress and the Copyright Office under this Chapter or Chapter 10. If no royalty pool exists from which their costs can be deducted, the Librarian of Congress and the Copyright Office are entitled to assess their reasonable costs directly to the parties to the most recent relevant arbitration proceeding. Moreover, the Library positions required hereafter to perform these duties and any duties related to the administration of the compulsory licenses of title 17 of the United States Code and of the statutory obligation of Chapter 10 are exempt from the provisions of § 307 of PL 103–69.

Transitional costs

Another cost function which concerns the Library is the transitional period during which the CRT ceases operation and the Library implements its new functions. Mr. Chairman, as you know the entire government faces difficult financial times and the need for firm budgetary control is imperative. The Library is doing its part to keep its costs down while doing more with less. However, as a budgetary matter, no money has been appropriated for FY 1994 for the new duties and responsibilities imposed by S. 1346. While the above-proposed language will aid in appropriating funds and filling positions for future fiscal years by exempting positions from the provisions of § 307 of PL 103–69, there is no money to carry out S. 1346 for the current year. Since the CRT currently has an appropriation for FY 1994, we recommend that the funds remaining in the CRT's budget after it ceases operation be transferred to the Library and the Copyright Office for their use. A new paragraph (c) should be added to Section 7 ("Effective Date and Termination") to read as follows:

> "(c) TRANSFER OF EXISTING APPROPRIATIONS—All appropriations approved by Congress in PL 103–69 for the Copyright Royalty Tribunal, including offsetting collections, shall be approved for transfer to the Library of Congress Copyright Office appropriations to the extent that the Copyright Office incurs costs in carrying out its duties under Chapter 8 of title 17 of the United States Code."

Interest on royalty fees

A third financial concern is the copyright owners' entitlement to interest earned on deposited royalty fees. The bill amends section 111(d)(2) of the cable compulsory license by striking the second and third sentences and inserting new language. The new language, however, omits copyright owners' entitlement to the interest which has been earned on royalties deposited in interest bearing accounts by the Copyright Office. Section 111(d)(2) currently provides that "All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution *with interest* by the Copyright Royalty Tribunal as provided by this

title". The new language provides only that "All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution by the Librarian of Congress in the event no controversy over distribution exists, or by a copyright arbitration royalty panel in the event a controversy over such distribution exists." A judge, applying normal rules of statutory construction, might rule that Congress acted intentionally in deleting "with interest" and decide that the copyright owners are not entitled to it.

We recommend that the phrase "with interest" be added back into the new language to make it clear that copyright owners are entitled to the interest earned from invested royalties.

We also recommend elimination of the new requirement to compile and publish on a semiannual basis a "compilation of all statements of account covering the relevant 6-month period." Neither the Copyright Office nor the CRT performs this duty under existing law, and we are not aware of the reason for the proposed duty. The statements of account are now, and should continue to be public records.

Phase-out of ongoing proceedings

The Act is set to take effect on January 1, 1994. On that date the CRT will cease to exist, and its workload will shift to the Library and the Copyright Office. It is our understanding that the Tribunal is currently involved in several ongoing proceedings, most significantly the distribution of the 1990 cable royalties. It is unlikely that the CRT will be able to complete hearings and issue a decision before its dissolution on December 31 of this year. The question arises about phase-out of ongoing proceedings. One alternative is that the Library must immediately convene an arbitration panel during the first of the year to review and examine the same testimony previously presented to the CRT, probably supplemented by other evidence, resulting in added costs and duplication to the involved parties. We therefore suggest consideration of a phase-out to allow the Tribunal and the present Commissioners to complete the unfinished business. Perhaps the bill could be amended to provide that any controversies or ratemakings commenced prior to a certain date would be completed by the CRT as of a specified date. We are completely flexible on dates, but suggest that the CRT could be allowed to complete any proceedings commenced prior to October 1, with an ending date of March 31, 1994. All other duties of the Tribunal would still move to the Library as of January 1, 1994. We realize that the status of the Commissioners may have to be clarified by the legislation, if this alternative is at all feasible.

Participation in panel proceedings

Another area of consideration is the proceedings of the arbitration panels. As noted in our analysis of the bill, there seems to be some uncertainty with respect to certain parties' participation in the arbitration process. The bill currently provides that copyright owners claiming to be entitled to cable or satellite royalties, and any "interested copyright party" claiming audio home recording royalties, may "submit relevant information and proposals to the arbitration panels in proceedings applicable to such copyright owner or interested party." The bill is not clear as to whether these submissions may be made in distribution proceedings only, or ratemaking proceedings as well. We suggest that the bill be amended to apply the language to both ratemaking and distribution proceedings.

Another, and more significant matter with respect to submissions to the panels by parties, is that there is no provision made for parties other than copyright owners and interested chapter ten copyright parties claiming royalties. Thus, for example, in a cable ratemaking proceeding, cable operators (who are not also copyright owners) would not be entitled to make any submissions of relevant information to the arbitration panel. This would be an injustice to cable operators, since they would clearly have a strong interest in a cable ratemaking proceeding. We, therefore, suggest that the bill be amended to allow "any interested copyright party" to participate in a ratemaking proceeding and "submit relevant information and proposals to the arbitration panels." It may be advisable to define this phrase for purposes of section 111 and 119 ratemaking. Further thought should be given to the different interests that should participate in a ratemaking proceeding in contrast to a distribution proceeding.

Public or private nature of proceedings

As a final matter with respect to the arbitration panels, the bill is silent as to the nature of the proceedings before the panels and among the panel members—i.e., whether they are public or private. The CRT currently operates in accordance

with the Government in the Sunshine Act so that all Tribunal meetings are public.[3] The bill could be amended to clarify that the proceedings are either public or private, or the Library could be directed to adopt appropriate regulations.

Public broadcasting license: ratemaking dates

A technical adjustment may be necessary with respect to periodic review of rates under the public broadcasting license of section 118. The bill eliminates subsection 118(c), which sets the schedule for periodic review of the 118 license rates. We request clarification whether it is intended not to have periodic review of 118 license rates. If there is no periodic review, is it intended that a ratemaking proceeding could be convened at any time there is an absence of a negotiated license agreement? How does the lack of periodic review relate to the authority to set rates binding on non-participants to the proceeding? That is, to the extent the arbitration panel sets the rates for those who do not enter voluntary agreements or participate in the proceeding, is there any limit on the time period a given set of rates may be put into effect? We tentatively recommend that the provision for periodic review be reinstated.

Time limit on conclusion of proceedings

Subsection (e) of new section 804 retains the one year time limit of existing law for conclusion of CRT proceedings. This provision seems inconsistent with the eight month time schedule set by subsections (d) and (e) of new section 802. We suggest clarification of this point, presumably by deletion of the one year provision in 804(e).

Mr. Chairman, the Library of Congress and the Copyright Office are ready to forge the brave new world of S. 1346. With our financial and budgetary concerns met by the proposed amendments, we will be able to meet the needs of both copyright owners and users alike in the efficient execution of the full responsibilities of the copyright compulsory licenses, without adding to the costs borne by the general taxpayer. Thank you.

Senator DECONCINI. Ms. Levering, thank you very much for your testimony and for some very good suggestions there as we proceed with this bill.

I know the Copyright Office often doesn't want to take a position, but can you help us? In your professional observation, do you believe the users of the copyright system now would be better off—or at least comparably served—if this legislation passed and we abandoned the Copyright Royalty Tribunal?

Ms. LEVERING. I think we can certainly say that they would be comparably served. We stand ready and willing to take on any responsibilities, and certainly the Library and the Copyright Office have considerable front-end responsibilities for the copyright compulsory licenses. Consolidation of the process, perhaps through the use of arbitration panels, is therefore a task well suited to the Library and the Copyright Office. We already possess the understanding and the expertise of administering the licenses, including the financial services to handle the deposit and the distribution of royalties.

While the new responsibilities of the bill would require some additional staff, we certainly are capable of taking on the additional responsibilities.

Senator DECONCINI. Thank you. You mean additional staff?

Ms. LEVERING. Yes, that's right.

Senator DECONCINI. I understand the Tribunal has a staff of nine people now. Would you anticipate that you would need nine people, outside the arbitration panels?

Ms. LEVERING. We established a working task force several weeks ago to look at all of the management, administrative, and legal concerns that this transition might involve. Our preliminary

[3] *See* 37 C.F.R. §§301.11–17.

estimates are that we could handle this with approximately five staff members, including an attorney. We would need an accounting specialist. We would need automation assistance and clerical assistance.

Senator DECONCINI. And would you have space for them?

Ms. LEVERING. That's always an issue, but we believe that we could accommodate them in the current physical plant.

Senator DECONCINI. So what you would need—and, Mr. Mulhollan, you point this out very well—you want to be sure that there are funds available for that additional burden.

Mr. MULHOLLAN. And also full-time-equivalent positions, now that the Legislative Branch is underserved. So what we are asking for as an exemption in the language is that we be allowed to backfill any vacancies that we would be able to fill. We are now in an "early out" position, as are other Legislative Branch agencies. This would allow us to fill those positions, and from those——

Senator DECONCINI. You would take the five people?

Mr. MULHOLLAN. Right. That's estimated, now, from our first run at this, that it may be more or less——

Senator DECONCINI. Have you had a chance to look at the salaries of those nine staff people?

Mr. MULHOLLAN. At CRT, sir?

Senator DECONCINI. Yes.

Ms. LEVERING. They would exceed the estimated salaries that we would estimate——

Senator DECONCINI. Which you would be paying?

Ms. LEVERING. Yes.

Senator DECONCINI. So you're talking about at least a 40 percent estimated reduction in staff, and some estimated reduction in salaries, are you not?

Ms. LEVERING. In salary costs, yes.

Mr. MULHOLLAN. In salary costs.

Senator DECONCINI. Mr. Mulhollan, what advantages, if any, do you see in placing the entire responsibility of the copyright compulsory license in the Library and Copyright Office as opposed to the current system, splits these duties between you and the Copyright Royalty Tribunal?

Mr. MULHOLLAN. As Ms. Levering has said, there are already a number of front-end responsibilities in our licensing provision for the copyright compulsory license. In looking at the proposal, at the consolidation of the process through the use of arbitration panels, I think that would be a task that would be particularly suited for the Library of Congress and the Copyright Office. We already possess the understanding and the expertise of administering licenses, including the financial services to handle the deposit and distribution of royalties. While the new responsibilities of the bill will require, as mentioned, some additional staff, we already possess—as you just noted—the physical plant. We are reducing 128 staff members in the Library of Congress this fiscal year, as requested, so we will have space for those people.

With our concerns regarding deduction of costs addressed, there should not be a considerable addition to our overhead.

Senator DECONCINI. Ultimately, from what you tell me, there would be a savings here by this legislation.

Mr. MULHOLLAN. It's my understanding the CRT currently deducts about 85 to 87 percent of its costs from the royalty pools, with the remaining 12 to 15 percent coming from the general fund. One of the requests that we have with you is to have a full-cost recovery for those costs——

Senator DECONCINI. I agree.

Mr. MULHOLLAN. So it would have no direct costs to the taxpayers.

Senator DECONCINI. I agree. And the present Commissioners are paid full-time, where under this legislation you would have the arbitration panels—or whatever we're going to call them—only paid as they come to perform their duties, which obviously would be some savings.

Ms. LEVERING. It really would depend on the amount of work in a given year.

Mr. MULHOLLAN. One of my understandings, sir, has been that it's the fluctuation of the work flow as an issue of cost. Sometimes it's very intense and sometimes less intense, and that's a problem as far as constancy is concerned.

Senator DECONCINI. The arbitration panels, obviously, are not going to serve 50 weeks out of the year.

Mr. MULHOLLAN. That's correct.

Senator DECONCINI. The use of arbitration panels is borrowed from the procedures currently appearing in section 119 of the Satellite Carrier Compulsory License. That procedure, however, was only adopted for setting royalty rates, and not for making distributions.

Do you believe that the arbitration panels can be effectively used for distribution as well as ratemaking, Mr. Mulhollan?

Mr. MULHOLLAN. I think the arbitration process which was utilized for the Satellite Carrier License last year was, for the most part, a success. While that panel only dealt with ratemaking, where essentially only two positions were being offered—that of the copyright owner, and the copyright users—we believe that arbitration is a workable alternative that can be utilized with respect to distribution, as well.

In essence, the panels would act like a mini-tribunal and would be given 180 days in which to complete their task. This should be ample time to conduct hearings, as the Tribunal has done; review and evaluate the testimony of the parties, as the Tribunal has done; and report its findings and conclusions, again, as the Tribunal has done.

The bill also requires that the arbitration panels act in accordance with prior decisions of the Copyright Royalty Tribunal; prior copyright arbitration panel determinations; and the rulings by the Library of Congress under section 801(a). While the identity of the panel members is likely to change from seating to seating, the Copyright Office would try to provide whatever assistance is necessary, including knowledge of precedents, to each panel to carry out its functions in an unbiased and effective way.

Senator DECONCINI. So your answer is yes?

Mr. MULHOLLAN. Yes.

Senator DECONCINI. Thank you. [Laughter.]

Ms. Levering, do you care to comment on that?

Ms. LEVERING. I agree with Mr. Mulhollan. There are concerns when there are multiple parties, whether the arbitration panel process would serve multiple parties. I think these are questions that I'm sure you will be addressing in your own considerations.

Senator DECONCINI. But do you believe that the arbitration panels can be effectively used for distribution as well as ratemaking?

Ms. LEVERING. We certainly think it's one of the workable alternatives.

Senator DECONCINI. Do you think the 180 days is too much time, Mr. Mulhollan, that we have in there for them to do that? I think it's 60 days now when they're supposed to make their reports, is that right?

Ms. LEVERING. No. They have a year now.

Senator DECONCINI. They have a year now?

Ms. LEVERING. Yes. I think the short time frame was last year in the one instance, when it was applied for the Satellite Carrier License. But now it is up to a year. Actually, the 180 days would be a shorter time frame. There are concerns——

Senator DECONCINI. Is that practical?

Excuse me for interrupting. Let me ask you this. Is there some reason they can't do it in a shorter time? I'm amazed at the time it takes.

Ms. LEVERING. I believe that part of the time frame allowed is to encourage settlement. So there is ample time for the parties to negotiate among themselves and to try to come to a settlement, if possible to avoid the expense and the additional time involved in a hearing.

If the time is too short, it would perhaps either force them or encourage them earlier to begin a formal proceedings, and it may not serve the purpose of encouraging advance settlements.

Senator DECONCINI. Thank you.

The last question that I want to ask is this. Based on what our records show on the amount of time that the Commission had met, for Sunshine meetings—open meetings—they have had 11.8 days, on average, per year, starting in 1987 through 1992. As a matter of fact, in 1992 they only had 5 days of open sessions. And some of those days, I am advised, are probably not full days.

On hearings, they have had an average of 20.8 days since 1978, ranging from 74 days in 1982 to zero days in 1992. So it is pretty clear just from the statistics that time-wise for the hearing process, that's not where the bulk of the time is spent.

Now, my question to either one of you is, is it a full-time job, the rest of those days during the year that necessitates three Commissioners paid in excess of $100,000? Can you give me an opinion?

Ms. LEVERING. It would appear not to be a full-time job, and I believe this is one of the concerns that have been articulated. There are peaks and valleys; there are times when the work is very intense, and then there are times when there is not work.

Senator DECONCINI. Do you concur?

Mr. MULHOLLAN. Yes. What we are looking at here, as I understand it, is a different approach in arbitration to decisionmaking, and as such we are looking at restructuring of how those decisions are made.

Senator DECONCINI. Thank you.

Senator Grassley?

Senator GRASSLEY. Thank you, Mr. Chairman.

I think you've done a pretty good job of discussing a question that both Senator DeConcini and I had about staffing, and I think you've given a full answer to the questions. Actually, the staffing question would relate to the extent to which the Library of Congress can do the work, so I think you've answered that.

But let me ask you if there is any other aspect of it, the Library of Congress taking on these responsibilities, any concerns that you might have in assuming the duties of the Commission, unrelated to staffing, and try to be specific. If you see some problems or if you see that you are fully capable of doing it, be as specific about that capability as you can, beyond the question of staffing.

Mr. MULHOLLAN. One thing I would like to note. The Library, as you well know, Senator, in its credentials has nearly 100 years' experience in all copyright matters. I think that has been successful experience and experience that has been edifying to the country.

The Library of Congress and the Copyright Office have always been willing to accept what the Congress calls on them to do, and that's the operating premise that we're taking on in responding to you in this current responsibility. Undoubtedly, in forging ahead in the new approach to the resolution of these matters, there will be problems, but that's what we're here to do, to help you to serve, as far as underlying principles.

As mentioned by Mary Levering with regard to the Licensing Division and the mechanics, statements of accounts, royalty fees, compulsory licenses, examining and processing statements, we have experience on that, and that experience is transferrable to the specific task at hand.

The Copyright Office is also legally responsible for both compulsory licenses, and fills statutory gaps through administrative rulemaking.

Since the Copyright Office has active participation on this front end, I think there is some logic that we would be well-suited to assist in the back end of that.

It will be difficult, but I think that with your help, we are there to meet those challenges, if you would ask us to do this.

Senator GRASSLEY. I have been a long-time supporter of alternative dispute resolution, what we call ADR. I have been able to get some of my ideas into legislation, so whether or not the Library of Congress has any role in dispute resolution interests me.

Now, I know you've described your current responsibilities in the royalty distribution area. This legislation would have the Library oversee actual dispute resolution. Do you feel the Library has the necessary expertise to do this?

Mr. MULHOLLAN. As in other expertise where Congress calls upon the Library, if we do not have it, we acquire it. In the question of working with arbitration panels that would be expected to conduct the proceedings, I think we have a standard as an institution to be fair and neutral in every way possible. From an institutional status, in working with arbitrators—one of the things with respect to selection is that the arbitrators might be provided by parties that come from an approved arbitration organization, perhaps the American Arbitration Association. This might help to

avoid the possibility of the parties submitting the names of persons who will only represent their interests in a marked degree of neutrality and professionalism.

I think such organizations have internal standards concerning the performance, training, ethics, and reasonableness of charges of arbitrators themselves that would help us along, and we would call upon those resources if given this responsibility.

Senator GRASSLEY. One last question. Do you think it would be practical for the Library to adopt any rules or practices or procedures, or even precedents, now used by the CRT? And if you were to do that, would that ease the rulemaking burden on the Library?

Mr. MULHOLLAN. We will review all those. Anything that will be applicable and useful, of course, I think would be the most reasonable course to take.

Senator GRASSLEY. I yield.

Senator DECONCINI. Thank you very much.

Thank you for your testimony. It has been very, very helpful to us.

Our next panel will be Ms. Cindy Daub, Chairperson, Copyright Royalty Tribunal; Bruce Goodman, a Commissioner of that same Tribunal; and Edward Damich, also a Commissioner; and John Midlen, an attorney here in Washington, DC.

By the way, I want the record to show a clarification on my statistics on the average of the Sunshine meetings. They actually average out, between 1987 and 1992, to 13.7 days per year, and the determinations are 23.9. The other statistics I put in there were taken by extrapolating the jukebox license hearings, which have not been a part of this since 1989.

Ms. Daub, thank you for being with us today. If you would summarize your testimony, please, and then we will proceed.

STATEMENT OF CINDY DAUB, CHAIRPERSON, COPYRIGHT ROYALTY TRIBUNAL, WASHINGTON, DC

Ms. DAUB. Mr. Chairman, Senator Grassley, thank you for the opportunity to appear before you.

Mr. Chairman, before I proceed with my remarks I would like to ask you to extend me the courtesy, that I may finish my statement in its entirety. I believe this may go over the 5-minute requirement.

Senator DECONCINI. How long do you estimate that would be, Ms. Daub?

Ms. DAUB. I would presume it would be around 12 minutes or so.

Senator DECONCINI. I have some time schedules, but we will proceed with that at your request.

I do ask the witnesses, if they can, to summarize. I don't know if Senator Grassley can stay here; I have some time restraints, but you may proceed.

Ms. DAUB. Thank you, sir.

Mr. Chairman, Senator Grassley, as you are aware, the Commissioners of the Copyright Royalty Tribunal are not appearing today as a unified body and with the same purpose in mind—the preservation of the Copyright Royalty Tribunal. The detailed statement I am now submitting for the record, therefore, represents my per-

sonal views. Appearing with me are Commissioners Goodman and Damich.

Mr. Chairman, the purpose of my testimony today is hopefully to provide constructive input into whatever ultimate determination is made by the subcommittee and the Congress on S. 1346.

I support and applaud your statement that there is "public demand for the reduction of waste and elimination of unnecessary programs." However, the proposed bill will not reduce waste nor eliminate any programs. The bill does not proposed to eliminate compulsory licenses. Compulsory licenses are still in effect and the bill merely proposes to shift implementation of the policy from a small agency to a bigger bureaucracy.

When compulsory licenses are no longer in effect, the natural thing to do will be to abolish the agency which administers them. On the other hand, as long as the policy remains, the only way to administer it is through an independent entity as it is set up currently, free of politics and political pressure.

When Congress first contemplated a mechanism to administer the new compulsory licenses during the early 1970's, Congress looked into the possibility of having the Copyright Office within the Library of Congress administer them, as is being proposed under the current bill. This alternative was rejected because of the legal implications and various negative effects it might produce. Instead, Congress wisely determined that establishment of an independent Copyright Royalty Tribunal to implement the law was preferable.

The Tribunal has a long history of successfully performing this difficult task with a small staff and a limited budget. In fact, the Tribunal has regularly returned portions of its budget to the claimants and the U.S. Treasury. Over the past 16 years the Tribunal has distributed over $10 million in satellite royalties; over $48 million in jukebox royalties; and over $1 billion in cable royalties.

The General Accounting Office, at the request of Congress, examined the operation of the Tribunal in the early 1980's. The GAO concluded in its report:

> It is clear the Tribunal was given a very difficult task, with no technical support, and minimal authority with which to work. The Tribunal has done what it was mandated to do. It has followed acceptable procedures and has made determinations required to date.

During the mid-1980's, however, the Tribunal experienced a difficult time. I would like to quote a paragraph from an article in Broadcasting Magazine by Bruce Forrest, of a respected Washington law firm, describing those days. Incidentally, Mr. Forrest is intimately familiar with the Tribunal's operations since he was on the Justice Department's appellate staff.

Mr. Forrest says in this 1985 article in Broadcasting Magazine:

> Cries for abolition or reform have recently been propelled by an episode: the resignation of the Tribunal's Commissioner, which in the long run should prove irrelevant to the Tribunal's work. Making funeral plans for the Tribunal has become something of a Washington parlor game. It is time to take more objective stock of the Tribunal. If one takes into account the agency's difficult and very subjective functions and the records put before it, I submit that one will find that the Tribunal has done precisely what Congress told it to do, and it has done its job quite well. Reform may very well be in order, but it must be passed based upon careful review of the Tribunal's statutory role and analysis of its performance based upon the records the parties put before it. Anything short of this will surely make things worse.

In spite of these brief periods of difficult times, CRT has been regularly lauded by the House Legislative Appropriations Subcommittee for its efficiency and professionalism. In the words of Chairman Vic Fazio:

When you think of all the money adjudication costs, it is an incredible total and small amount of public funds to make it all happen. You (the Tribunal) are really doing the job. You have not taken advantage at all of the sources of revenue that you have coming to you. I think everyone on the Tribunal has operated in a very businesslike way.

This was his statement during the 1993 budget hearings.

Additionally, the Tribunal has a sterling appeals record since its inception. Except for a few partial remands, all of the Tribunal's decisions have been affirmed by the courts.

Mr. Chairman, in introducing the bill, you identified the workload of the Tribunal as the reason for wanting to abolish the agency. If the subcommittee is basing its conclusion as to the Tribunal's workload on the annual number of days of oral hearings, as did the House subcommittee, this assumption results in an inaccurate picture of the Tribunal's workload.

As others have indicated, the Tribunal implements five compulsory licenses and the new Audio Home Recording Act of 1992, referred to as DART, a new responsibility which Congress imposed on the Tribunal effective October of last year. The Tribunal's implementation of these statutes is twofold: ratesetting and royalty distribution. As in any type of litigation, the major part of the work is done outside of the courtroom.

The 1989 cable royalty distribution proceeding, which began in 1991 and was completed in May 1992, provides a perfect example of the complex nature of the Tribunal's distribution proceedings. Over 700 claims were filed. The Commissioners and the general counsel reviewed and digested nearly 9,000 pages and direct and rebuttal cases, post-hearing briefs and replies, and transcripts. Prior to the filing of direct cases, the Tribunal entertained 35 interlocutory motions and comments. The Tribunal also entertained over 40 motions and comments raising discovery issues. Finally, the Tribunal entertained dozens of motions and comments addressing miscellaneous interlocutory matters. This complex proceeding produced only 36 days of oral hearings. However, it additionally resulted in over two dozen Tribunal decisions, and the substantial involvement of the Tribunal with the parties to negotiate and facilitate resolution of the many interlocutory matters that arose.

In 1992, the Tribunal held a ratesetting proceeding for noncommercial broadcasting. At the request of the parties, the proceeding consisted of a "paper" rather than an "oral" hearing. The Commissioners and general counsel reviewed and digested nearly 1,000 pages of direct cases and post-hearing briefs. The Tribunal also entertained nearly a dozen notices and comments regarding settlements and the new rules implementing the rate changes. Markedly, this entire proceeding, Mr. Chairman, yielded no hearing days and only one Sunshine Act meeting day. As these two examples show, much of the Tribunal's work is done outside of the hearing room as the agency strives to achieve resolution of conflict and come to universal settlement.

In February 1992 the CRT assembled an arbitration panel for the purpose of adjusting the satellite rate, and then reviewed the panel's determination to assess whether it complied with the statutory criteria. Upon finding that the determination was reasonable, the CRT adopted and published it in May 1992.

During the same calendar year 1992, the Tribunal held a proceeding to determine distribution of the combined 1989– 1990–1991 satellite royalties. The Tribunal bifurcated the Phase I proceeding in the hope that resolution of this interlocutory—but significant—matter would result in the parties reaching a universal settlement. Once the Tribunal resolved the interlocutory issue, the parties did in fact reach a global settlement.

In addition to all of the above, during the latter part of 1992 the Tribunal also had to deal with implementation of the new Audio Home Recording Act. The Tribunal held informal meetings with parties affected by the new act; published notice for comments; answered numerous inquiries regarding the act, and issued an Advance Notice of Rulemaking and interim regulations.

What I have just described, Mr. Chairman, provides just a glimpse of the Tribunal's workload during 1992. I might add that much of that work was done prior to the arrival of my two colleagues to the Tribunal.

Currently, Mr. Chairman, the Tribunal is engaged in the oral hearing portion of the 1990 cable distribution, which commenced on September 7.

Of the nine parties participating in the distribution proceeding, three parties have settled and six parties are presenting evidence before the Tribunal. Since September 7, the Tribunal has heard testimony from a portion of the witnesses of the first party to present its case. In order to complete this proceeding in a timely fashion, the Tribunal is forced to reserve Saturdays and a Federal holiday for hearings.

Mr. Chairman, it must be underscored that all of this work was achieved with a total of nine people, including the Commissioners. This was realized with a modest annual budget of $911,000. Moreover, currently 88 percent of these costs were shouldered by the claimants, the very parties that benefit from the Tribunal's services, with the taxpayers shouldering a mere 12 percent of these costs. I defy any Federal agency to match that record.

I would like to comment at this time on the use of arbitration panels in administering compulsory license, as proposed in the bill. The proposed bill relies largely on the success of last year's section 119 satellite rate adjustment proceeding, under the supervision of the Tribunal, where there were two distinct parties: the owners on one hand, and the users on the other.

Senator DECONCINI. Ms. Daub, excuse me. We're going to have a vote at 11:15. You're going to have to wind up.

Ms. DAUB. All right. I will try to rush.

The bill currently proposed, Mr. Chairman, is based on a concept common in bilateral commercial labor arbitrations.

The Tribunal's distribution proceedings, which consists of 80 percent of the workload, typically involves nine parties of varying sizes. If you're talking about DART legislation, the distribution pro-

ceedings could conceivably involve dozens of parties, each with individual objectives in as "zero-sum game."

Consequently, if two arbitrators are to be selected by the Librarian of Congress, as the bill proposes, two of the distinct parties with political clout and the means, at most, will have a nominee on the panel. Such politicizing of the process which involves hundreds of millions of dollars is of particular concern to the smaller claimants. It is inevitable that the selection of a panel will force a battle before, during, and after the actual arbitration proceeding. This battle will add time, expense, and burden to the process. This concern was expressed by Public Broadcasting and National Public Radio in their opposition to the bill which was submitted to the House subcommittee as written testimony.

Notably, this very concern was also expressed by Congressman Jack Brooks, chairman of the Committee on the House Judiciary, with regard to the DART legislation. In the DART legislative history, Congressman Brooks explained that a provision requiring mandatory, binding arbitration of any disputes involving the affected manufacturing party and interested copyright parties had been removed by the committee because of the concern that such arbitration might be unfair to small parties. The legislation was passed without the requirement.

Mr. Chairman, the next point I want to make is that the use of arbitration panels will increase costs to the parties for the following reasons.

One, the ad hoc panel will lack continuity and stability.

Two, the proposed legislation states that the entire cost of the arbitration panel be placed on the participating parties. Unlike current law, which allows the Tribunal to deduct the costs of the proceeding from the specific royalty pools, this proposal will result in directly assessing the costs to the participants. This will result in a few participating parties shouldering the costs, rather than all of the benefitting parties sharing the costs evenly.

Since the ad hoc panel will not be convened until a controversy is declared, resources for facilitating settlements will be lacking, the result being increased litigation.

Arbitrators will have little incentive to settle or expedite the proceedings, since their compensation will be based on the length of the proceeding, very likely at law firm hourly rates.

The bill destroys the essential independent nature of the decisionmaking body. A two-tier process for copyright royalty decisions will become a four-tier process. The use of arbitrators to distribute hundreds of millions of dollars raises conflict of interest concerns, since no Senate scrutiny will be required.

PBS and NPR in their opposition to the bill have said:

> Indeed, we believe that in some sense the success of the CRT has contributed to this discussion. The frequency of settlements among the parties to CRT proceedings, we believe, are a direct result of the stability and predictability provided by the CRT.

I will skip over, Mr. Chairman——

Senator DECONCINI. Thank you, Ms. Daub. I'm going to have to move on, if you can conclude, please. Your full statement will be in the record.

Ms. DAUB. Yes, Mr. Chairman. I hope my testimony clarifies your concern regarding the workload of the agency. However, in support of a current effort by the Administration and yourself, in reducing Government expenditures, I propose the following changes to the operation of the agency.

One, fully fund the Tribunal's budget with royalty funds. This proposal will find support in the industry and will follow the Tribunal's long tradition of cost consciousness. Several parties have already indicated their support for this.

Two, I propose the current statute be modified to ensure the staggering of the Commissioners' terms.

Mr. Chairman and members of the subcommittee, during your deliberation of this bill I want you to remember that this agency of nine persons distributes over $200 million a year; sets royalty rates operating primarily with user fees; and its claimants are generally happy with its operations. Then ask yourselves, who does this bill benefit? Not the taxpayers, certainly not the claimants, not even the process. The Copyright Office itself expressed their concerns in implementing this bill, although they have expressed their willingness to implement it if it becomes law.

I strongly ask you to consider these views, Mr. Chairman. This concludes my statement. Thank you for your attentiveness.

[Ms. Daub submitted the following:]

PREPARED STATEMENT OF CINDY DAUB

SUMMARY

Mr. Chairman and Members of the Subcommittee, I am honored to have been invited to appear before you to testify on the Copyright Royalty Tribunal Reform Act of 1993 ("Bill").

My written testimony is divided into six sections.

Section I includes a general introduction.

Section II delineates the Tribunal's workload.

Section III details the Tribunal's current staff and modest budget, which is 88 percent funded with royalties and 12 percent funded with tax dollars.

Section IV sets out the Tribunal's long history of accomplishments achieved with limited resources.

Section V is an analysis of the Bill. My analysis reveals that: a) the Bill has no cost savings and will in fact increase costs; b) the Bill may destroy the essential independent nature of the decision making body; c) the arbitration proposal will hamper settlements by reducing the resources available for facilitating settlements; d) the panel lacks the necessary stability and continuity to enable proper performance of all statutorily mandated functions; e) the use of arbitrators, to distribute hundreds of millions of dollars, raises conflict of interests concerns, since no Senate scrutiny will be required; and f) panel determined rates will no more closely resemble marketplace rates than that of the Tribunal since the panel will be subject to the same statutory restraints that have applied to the Tribunal, and the Tribunal has made every possible effort to simulate the marketplace.

Section VI delineates my proposal to fully fund the Tribunal's budget from the royalties it distributes.

Mr. Chairman, I do not agree with the observation that the Tribunal is an unnecessary agency, without a sufficient workload, to justify its continued existence.

I believe that the Tribunal is a worthwhile agency, which has done and continues to do exactly what Congress mandated it to do. I believe that the Tribunal has done its job well, and therefore, should be permitted to continue to perform its statutorily mandated responsibilities.

I. INTRODUCTION

Mr. Chairman, and Members of the Subcommittee. Thank you for inviting me to testify. As you are aware the Commissioners of the Copyright Royalty Tribunal are

not appearing today as a unified body, with the same purpose in mind—the preservation of the Copyright Royalty Tribunal. Therefore, the detailed statement that am now submitting for the record and my oral remarks represent my individual views.

Mr. Chairman, the purpose of my testimony today is to hopefully provide constructive input which will assist Congress in making its ultimate determination on S. 1346, a bill which to replace the Copyright Royalty Tribunal with arbitration panels, under the direction of the Librarian of Congress ("Librarian").

Mr. Chairman, in your introduction of the Bill, you state that it will reduce waste and eliminate an unnecessary agency. Specifically, you delineate the following positive effects that will result from the switch to arbitration panels:

> First, eliminate an unnecessary agency; second, place 100 percent of the costs of arbitration on the parties, not on the taxpayers; third, increase the incentive to settle rather than litigate disputes; and fourth, enable agreements to better reflect market rates rather than a Government set license rate.

Congressman William J. Hughes, Chairman of the Subcommittee on Intellectual Property and Judicial Administration, who introduced H.R. 2840, the companion bill in the House, describes his bill as a win-win proposition that will eliminate an unnecessary agency, reduce the size of legislative branch employment, and remove bureaucratic obstacles to the enforcement of copyright.

On the surface, these bills seem appealing, but even a brief review of the bills reveals that they will not meet any of the proposed goals. In fact, these bills will have the contrary effect.

This Subcommittee is well aware of the Tribunal's statutorily mandated areas of responsibilities. Therefore, I will just briefly outline the Tribunal's responsibilities. I will, however, concentrate my presentation on the Tribunal's workload and the flaws in the Bill.

II. THE TRIBUNAL'S WORKLOAD

This Subcommittee cites the agency's workload as a primary reason for abolishing the Tribunal. Mr. Chairman, you have expressed your belief that the Tribunal's workload does not justify the continued existence of the agency.

The House Subcommittee also reasoned that the Tribunal's workload, or lack of it, in proposing the agency's abolition. The House Subcommittee bases its conclusion as to the Tribunal's work load on the annual number of days of oral hearings and Government in the Sunshine Act meetings (these meetings include only deliberations of a quorum of the agency, where the deliberation determines or results in the disposition of official agency business). This assumption, however, results in an inaccurate picture of the Tribunal's workload.

The Tribunal implements five compulsory licenses and the Audio Home Recording Act of 1992 (AHRA). The Tribunal's implementation of these statutes is twofold: ratesetting and royalty distribution. With regard to these six areas of responsibility, the Tribunal distributes cable, satellite, and AHRA royalties. Phono record and public broadcasting royalties are distributed privately. Jukebox royalties are distributed subject to a voluntary agreement. The proposed legislation would repeal the jukebox compulsory license, and therefore, remove this license from the Tribunal's scope of authority. The Tribunal also handles the ratesetting for four of the compulsory licenses (jukebox rates are currently prescribed by a voluntary licensing agreement) and AHRA. However, the Tribunal also handles rule makings, other than those involving ratesetting. Under the Administrative Procedure Act, members of the public are entitled to, and have in the past, petitioned the Tribunal to amend its rules.

By far, the Tribunal devotes most of its efforts to the distribution aspect of its statutory responsibilities. Distribution proceedings are complex administrative litigation proceedings that involve the filing of hundreds of claims for million of dollars in royalties. These proceedings are comprised of many stages which require the Tribunal to address issues that arise regarding the timeliness and completeness of the royalty claims; interlocutory motions; requests for clarification; direct cases, including intricate statistical data; settlement; and public inquiries regarding Tribunal procedures (especially in the case of the new AHRA proceedings). As in any type of litigation, the major part of the work is done outside of the court room.

The 1990 Cable Royalty Distribution Proceeding, which is currently being litigated before the Tribunal, is a perfect example of the considerable time and effort involved in a distribution proceeding. Over eight hundred (800) claims were filed with the Tribunal. The Commissioners and the General Counsel have had to review and digest nearly twenty-six hundred (2,600) pages of direct cases. In addition, before the proceeding is completed, the Commissioners and the General Counsel will

have had to review and digest hundreds of pages of rebuttal cases, post-hearing briefs, and hearing transcripts. To date, the Tribunal has entertained thirty-one (31) motions and over thirty (30) comments involving interlocutory matters. The Tribunal has already issued over sixty (60) orders and notices in this proceeding. It has also held twelve (12) days of Sunshine Act meetings and hearings. This data does not include the countless hours spent by the Commissioners and the General Counsel in briefings and discussions regarding varied and complex interlocutory matters.

The 1989 Cable Royalty Distribution Proceeding, which began in February 1991 and was completed in May 1992, provides an example of the complex nature of a completed Tribunal distribution proceeding. Over seven hundred (700) claims were filed with the Tribunal. The Commissioners and the General Counsel reviewed and digested nearly 9,000 pages of direct and rebuttal cases; post-hearing briefs and replies; and transcripts. Prior to the filing of direct cases, the Tribunal entertained thirty-five (35) interlocutory motions and comments. The Tribunal also entertained over forty (40) motions and comments raising discovery issues. Finally, the Tribunal entertained dozens of motions and comments addressing miscellaneous interlocutory matters. This complex proceeding produced only thirty-six (36) days of oral hearings. Additionally, however, it also resulted in over two dozen Tribunal decisions, and the substantial involvement of the Tribunal with the parties to negotiate and facilitate resolution of the many interlocutory matters that arose. This data, however, does not take into account the time and effort exerted by the Tribunal in attempting to obtain a universal settlement of the proceeding.

During the calendar year 1992, the Tribunal held a proceeding to determine distribution of the combined 1989–1991 satellite royalties. This proceeding was unique in that it required the holding of a bifurcated Phase I proceeding.

Stage I of Phase I included a prehearing conference and a "paper" hearing, involving a complicated legal issue. The Tribunal bifurcated the Phase I proceeding in the hope that resolution of this interlocutory, but significant, matter would result in the parties reaching a universal settlement as to the distribution of the royalties. Once the Tribunal resolved the interlocutory issue, the parties did, in fact, reach a universal settlement. The Tribunal was prepared to distribute the 1989–1991 royalties, which amounted to approximately $10 million, in December of 1992. At the request of the parties, the royalties were not distributed until January of 1993.

The Tribunal's ratesetting proceedings, although demanding less of the Tribunal's time and effort, are significant proceedings. In 1992, the Tribunal held a ratesetting proceeding for noncommercial broadcasting. The proceeding commenced in May 1992 and terminated in December 1992. At the request of the parties, the proceeding consisted of a "paper" rather than an "oral" hearing. The Commissioners and General Counsel reviewed and digested nearly 1,000 pages of direct cases and post-hearing briefs. The Tribunal also entertained nearly a dozen notices and comments regarding settlements and the new rules implementing the rate changes. Additionally, because these proceedings occur at five year intervals, parties needed the Tribunal's guidance with regard to procedure. Markedly, this entire proceeding yielded no hearing days and only one Sunshine Act meeting day.

In February 1992, the CRT assembled an arbitration panel for the purpose of adjusting the satellite rate, and then reviewed the panel's determination to assess whether it complied with the statutory criteria. Upon finding that the determination was reasonable, the CRT adopted and published it in May 1992.

In addition to all of the above, during the latter part of 1992 and throughout 1993, the Tribunal has had to deal with implementation of the new AHRA. The Tribunal held an informal meeting with parties affected by the AHRA and answered numerous telephone inquiries regarding AHRA. The Tribunal has also issued an *Advance Notice of Rulemaking and Interim Regulations.* The Tribunal is in the process of issuing the final regulations.

During 1993, the Tribunal has also grappled with the first AHRA distribution processing. During the first couple of months in 1993, the Tribunal received 80 claims for 1992 AHRA royalties. Pursuant to statutory mandate, the Tribunal has declared a controversy in the proceeding and is in the process of facilitating settlement. Although partial settlements have occurred, the Tribunal will most likely have to hold hearings throughout January, February and March of 1994.

III. TRIBUNAL BUDGET AND STAFF

Mr. Chairman, it must be underscored that all of this work was achieved with three Commissioners, one professional staff member, the Tribunal's General Counsel, and without any professional consultants. This was realized through the expert budget management of a modest annual budget of $911,000. Moreover, 88 percent of these costs were shouldered by the claimants, the very parties that benefit from

the Tribunal's services, with the taxpayers shouldering a mere 12 percent of these costs. I defy any agency to match that record.

It is also worth noting that the Tribunal was originally appropriated enough funds for a staff of eighteen. However, rather than take advantage of this appropriation, the Tribunal convened with a staff of ten. Now sixteen years later, the Tribunal functions with a staff of nine. I dare say, not too many Federal agencies can claim that, almost two decades later, although their responsibilities have increased, their staff has decreased.

IV. THE TRIBUNAL'S RECORD

The Tribunal's recent accomplishments are not unique. The Tribunal has a long history of successfully performing difficult and very subjective statutory functions with a small staff and a limited budget. *See* Attachment A. From 1977, when the Tribunal commenced operating with a budget of $276,000, to present when it operates with a budget of $911,000, the Tribunal has performed its responsibilities with a budget of under one million dollars. In fact, the Tribunal has regularly returned portions of this budget to the claimants and U.S. Treasury. See Attachment B. Over the past sixteen years, the Tribunal has distributed over $1 billion in cable royalties; $48 million in jukebox royalties; and $10 million in satellite royalties. See Attachment C. As a matter of record, on October 7, the Tribunal will distribute 90 percent of the 1991 cable royalty fund. This fund exceeds $200 million.

In 1981, the General Accounting Office (GAO), at the request of the Committee on the Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House of Representatives, examined the operation of the Tribunal. GAO's study was based on an examination of the Tribunal's legislative history, its proceedings and procedures, interviews with Tribunal Commissioners, meetings with eighteen organizations affected by the Tribunal's operations, and other key individuals familiar with the Tribunal and the compulsory licenses it oversees. Notably, the key individuals and the representatives of the eighteen organizations interviewed were assured that all comments that might affect their future dealings with the Tribunal would be kept confidential.

The GAO study reported that, with limited exceptions, the Tribunal was recognized by the affected interests as a competent body. Other than criticisms involving the problems that regularly occur in court rooms, and the Tribunal's legislative mission, the interviewed parties had no criticisms of the Tribunal. *See* Statement of Wilbur D. Campbell, Deputy Director, Accounting and Financial Management Division, Before the Committee on the Judiciary Subcommittee on Courts, Civil Liberties and House Representative (June 11, 1981).

In its report, the GAO concluded as follows:

> It is clear the Tribunal was given a very difficult task, with no technical support, and minimal authority with which to work. The Tribunal has done what it was mandated to do. * * * It has followed acceptable procedures and has made determinations required to date. *Id.* at 6, 22.

The Legislative Appropriations Subcommittee has regularly lauded the Tribunal's efficiency and professionalism. In the words of Chairman Fazio,

> When you think of all the money adjudication costs, it is an incredible total and small amount of public funds to make it all happen * * * You [the Tribunal] are really doing the job. You have not taken advantage at all of the sources of revenue that you have coming to you. I think everyone on the Tribunal has operated in a very businesslike way. *See* Fiscal Year 1993 Legislative Branch Appropriation Request: Before the Subcommittee on Legislative Appropriations of the House Committee on Appropriations, 102 Cong., 2nd Sess. 264 (1992) (*Statement* of Chairman Fazio).

The United States Court of Appeals for the District of Columbia has found the Tribunal's efforts to set a market price "more than reasonable" in light of Congress' mandate to have the Tribunal operate as a substitute for the market place. *See National Cable Television Association, Inc.* v. *Copyright Royalty Tribunal,* 724 F.2d 176, 185 (1983); *Cf. ACEMLA* v. *Copyright Royalty Tribunal,* 854 F.2d 10 (2nd Cir. 1988). The Court has also acknowledged the fact that the Tribunal, by establishing precedents (the game rules), has facilitated settlement among the parties. In the words of the Court, "[t]he umpire has established precedents on which the players may rely in submitting their claims." *See National Association of Broadcasters* v. *Copyright Royalty Tribunal,* 675 F.2d 367,385 (1982), *quoted in NBC* v. *Copyright Royalty Tribunal,* 848 F.2d 1289, 1297 (D.C. Cir. 1988). Additionally, the Tribunal

has a sterling appeals record since, except for a few partial remands, all of the Tribunal's decisions have been affirmed by the Court. *See* Attachment D.

V. ANALYSIS OF THE COPYRIGHT REFORM ACT OF 1993 ARBITRATION PANEL MODEL

Both bills rely on the "success" of the satellite ratesetting arbitration panels to support their proposal. However, there is no basis for comparing ratesetting to distribution proceedings. As is indicated in the written testimony of National Public Radio and Public Broadcasting Service (in their opposition to the bill), which was submitted both to the House and Senate Subcommittees, the selection of two arbitrators from lists submitted by the parties and professional arbitration organizations, and the selection of the third arbitrator by the two party-nominated arbitrators is a concept common in bilateral commercial and labor arbitration. The Tribunal's distribution proceedings, however, have typically involved nine parties of varying sizes (under the new AHRA legislation, distribution proceedings could conceivably involve dozens of parties), each with individual objectives "in a zero-sum game." Consequently, if two arbitrators are to be selected by the Librarian of Congress, upon the recommendation of the Register of Copyrights ("Register"), two of the distinct parties, at most, will have a nominee on the panel. Equally disturbing is the fact that the sole person who has the ultimate responsibility of choosing the arbitrators, the Librarian, will be a political appointee, thereby seriously politicizing a process which involves hundreds of millions of dollars. Such politicizing of the process is of particular concern to the smaller claimants, since the larger claimants will be in a better position to exert influence on the selection process. In view of the foregoing, it is inevitable that the selection of a panel will force a battle before, during, and after the actual distribution proceeding. This battle, which undoubtedly will prove to be a hotly contested one, will add time, expense, and burden to the process.

Notably, this very concern was expressed by Congressman Jack Brooks, Chairman of the Committee on the Judiciary, with regard to the AHRA legislation. In the AHRA legislative history, Congressman Brooks explained that a provision requiring mandatory, binding arbitration of any disputes as to the new digital audio recording devices or digital audio interface devices, which involve the affected manufacturing party and interested copyright parties, had been removed by the Committee because of the concern that such arbitration might be unfair to small parties. *See* H.R. Rep. No. 873, 102d Cong., 2d Sess., pt. 1, at 15 (1992). The legislation was passed without the requirement. *See* 17 U.S.C. § 1010 (1992).

The Committee's concern is particularly relevant with regard to the current proposal because in the AHRA scenario, the controversy would involve basically two viewpoints. Therefore, the Committee's concerns as to the prejudicial effect of arbitration panels on small parties should be seriously considered with regard to the current proposal, which would involve proceedings with multiple parties of differing sizes and political clout.

The use of arbitrators to determine the distribution of hundreds of millions of dollars presents certain basic concerns. Currently, Commissioners undergo a thorough scrutiny during the Senate confirmation process. The confirmation process is crucial because it weeds out potential and actual conflicts of interest. Arbitrators, however, will not be required to undergo any such scrutiny. Even though it is the Librarian who will convene the panel, the Librarian will not have the resources to undertake a scrutiny, in any way, comparable to that of the Senate.

Mr. Chairman, your final point in support of the proposed Bill is that "arbitrated rates can be expected to more closely resemble market rates than a government-set compulsory license fee." I take issue with this unsubstantiated conclusion. The Court of Appeals has stated that, based on the statutory guidelines, the Tribunal's efforts to set market prices are "more than reasonable." *See National Cable Television* v. *Copyright Royalty Tribunal,* 724 F.2d at 185. A legal practitioner, who is familiar with the Tribunal's work, made a similar observation, stating that "in the absence of changes in the substantive statutory guidelines, it should not be assumed that a different decision maker * * * [will make] a substantially different decision." *See* Attachment A.

The arbitration panel will have to operate under the same statutory restraints that have applied to the Tribunal. In the event of a controversy, it will have to hold hearings to entertain oral and written evidence of the value of "intellectual property created by a population of artists as diverse as our culture." *Id.* It will then, based on the record, undertake the difficult and subjective task of determining a rate as close as possible to a marketplace rate. This is exactly the task that the Tribunal has performed over the past sixteen years. As noted earlier, however, the arbitration panel will lack the ability and incentive to facilitate settlements.

The elimination of the Tribunal and the transferring of its responsibilities to the Librarian, as administered through arbitration panels, will not decrease costs to taxpayers and claimants. Rather, such a move will increase the total costs of the proceeding. Currently, approximately 12 percent of the Tribunal's operating budget (no more than $128,000) is funded with taxpayer dollars. It should not go unnoticed that the major portion of the Tribunal's budget is funded from the very royalties it distributes.

Use of arbitration panels, however, will increase the parties' costs of the proceedings for the following reasons:

a) The ad hoc panel will lack continuity and stability, which will result in increased litigation (one advantage of the current Tribunal approach is that, "[t]he Commissioners and permanent staff have * * * developed a working knowledge of copyright and the factors related to the ratemaking and distribution process, resulting in institutional efficiencies". *See* Statement of Ralph Oman, Register of Copyrights, before the Subcommittee on Intellectual Property and Judicial Administration at 32 (March 4, 1993).

b) The proposed legislation clearly states that the entire cost of the arbitration panel will be placed on the participating parties. Unlike the current law, which allows the Tribunal to deduct the costs of the proceeding from the specific royalty pools, this proposal will result in directly assessing the costs to the participants. The practice of charging only the participants to a proceeding is troubling, since it could result in a few participating parties shouldering the procedural costs, rather than all of the benefitting parties sharing the costs evenly. *Id.* at 31–32;

c) Since the ad hoc panel will not be convened until a controversy is declared, resources for facilitating settlements will be lacking, the result being increased litigation;

d) Arbitrators will have little incentive to settle or expedite the proceedings since their compensation will be based on the length of the proceeding, "very likely at law firm hourly rates" *See* Testimony of Douglas J. Bennet, President, National Public Radio, submitted to the Subcommittee on Intellectual Property and Judicial Administration at 9 (March 18, 1993); and

e) A two-tier process for copyright royalty decisions will become a four-tier process with review by the Register and the Librarian a prerequisite to judicial review. *Id.*

The proposed legislation will also increase taxpayer costs for the following reasons:

a) The legislation proposes to impose numerous additional responsibilities on the Librarian and Register. These additional responsibilities, which include the weighty responsibility of settlement facilitation, resolution of pre-controversy issues, and review of the panel's decision, will require additional Copyright Office staff, resulting in increased administrative costs. This fact has been confirmed by the Copyright Office. *See* Statement of Ralph Oman, at 31. Under the proposed legislation, these costs will be assumed by the taxpayers;

b) The legislation proposes to fold a small agency (9 employees total, including the Commissioners), with approximately 90 percent of the budget coming from the user fee which represents less than one-half of one percent of the total royalties it administers, a line-item budget of less than one million dollars, into a large bureaucracy. This will lead to a result which contradicts your stated goal of eliminating bureaucracy. Inevitably, the additional "statutory responsibilities" will translate into increased budgetary requests by the Library of Congress.

The proposed Bill has draw backs other than the added costs to the claimants and taxpayers. Specifically, transferring the Tribunal's responsibilities to the Librarian with the assistance of the Register may destroy the vital independent nature of an entity that, not only determines distribution among copyright owners, but also establishes rates for copyright users. The Tribunal historically has been,

> An independent agency, free from political pressures, engaged in balancing the equities of copyright owners and copyright users based solely on the record evidence placed before it. It is neither owner friendly nor user friendly, but a completely neutral arbiter. *See* Copyright Royalty Tribunal Reform: Hearings on H.R. 2752 and H.R. 2784, Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice for the House

Committee on the Judiciary, 99th Cong., 1st Sess. 161 (1985) (*Statement* of Edward W. Ray, Acting Chairman of the Copyright Royalty Tribunal).

Independence from the Copyright Office is essential to the effectiveness of the Tribunal, because the Copyright Office has been perceived as an advocate of the copyright owner. This preconception, whether or not justified, may frustrate the Copyright Office's ability to perform the most crucial of the Tribunal's roles, that of settlement facilitator. This is a role which the Tribunal has performed well. I believe that the Tribunal has, without exception,

> Steadfastly insisted on private settlements rather than give in to the tendency of other agencies toward greater government involvement in the market place. *Id.*

Such an agency has unquestionably served the public interest well.

My colleague, Commissioner Goodman, noted in his letter of February 17, 1993, that the Tribunal "has managed to achieve the remarkable feat of displeasing both program owners * * * and many cable operators." *See* Letter from Commissioner Bruce Goodman to House Copyright Subcommittee Chairman William Hughes (February 17, 1993). Commissioner Goodman's observation, in fact, underscores the Tribunal's success as a negotiator. A good negotiator is one who negotiates a deal which somewhat displeases each side, by making each side feel that it has relinquished something to obtain the agreement. The worst scenario is where one side is perceived, rightly or wrongly, as always winning the negotiations. Such a situation will surely chill the prospects of settlement.

Finally, the Register recently resigned. In light of this event, in addition to the changes proposed by Title I of the Copyright Reform Act-H.R. 897 (proposed changes to the registration requirements), it is likely that the Copyright Office will be undergoing critical changes in the near future. Considering the many hurdles currently facing the Copyright Office, the decision to transfer all of the Tribunal's responsibilities to it, at this time, appears counterproductive. In the words of former Register of Copyrights, Barbara Ringer, "* * * moving the Copyright Royalty Tribunal into the [Copyright] Office * * * will mean more work and misery for the [Copyright] Office. The Tribunal approach offers continuity over the ad hoc arbitration that is proposed." *See COPYRIGHT ADVISORY GROUP FORMED—Former Register Barbara Ringer is Co-Chair,* COPYRIGHT Notices, (Vol. 41, Number 6), at 2 (June 1993).

VI. RECOMMENDATION

Mr. Chairman, although, as I have discussed above, I believe the Tribunal is an efficient and productive agency, I recognize that these are truly drastic times for this country. It is, therefore, imperative for every Federal Agency to examine ways to minimize taxpayer burden. Accordingly, I offer the following recommendations:

Budget: Fully fund the Tribunal's budget from the royalty funds.

> This financing method was originally proposed by former Legislative Appropriations Subcommittee Member Representative Burgener of California, as a means of reducing the tax burden. I believe that this proposal will find support in the industry, and will follow in the Tribunal's long tradition of cost consciousness.

Structure: The current statute should be modified to ensure the staggering of the Commissioners' terms. The terms should be staggered by two-year intervals.

> The staggered terms will guarantee that the majority of the Tribunal will remain in place through each and every change in Commissioners. Such stability is necessary to safeguard the interests of the Tribunal, and to ensure that no one Commissioner's self-interest overrides the interests of the agency.

Mr. Chairman, I am not here to try to save my job, but rather I am here because truly believe that the Tribunal is a worthwhile agency and one that should remain in existence. I strongly ask that you reconsider the Bill.

Mr. Chairman, that concludes my statement.

Media Law

A Copyright Royalty Tribunal commentary from Bruce Forrest, Farrow, Schildhause, Wilson & Rains, Washington

Coming to the defense of the Copyright Royalty Tribunal

The necessity of a Copyright Royalty Tribunal and the role of the compulsory license have been the subject of fair-minded debate for some time. There have also been less useful *ad hominem* attacks on the tribunal members and their decisions. The tribunal's commissioners are called "political hacks" and "incompetent," their rulings "plucked out of thin air," sometimes "outrageous." Cries for abolition or reform have recently been propelled by an episode (the resignation of the tribunal's chairman) which, in the long run, should prove irrelevant to the tribunal's work. Making funeral plans for the tribunal has become something of a Washington parlor game.

It is time to take more objective stock of the tribunal. If one takes into account the agency's difficult, and very subjective, functions and the records put before it, I submit that one will find that the tribunal has done precisely what Congress told it to do, and it has done its job quite well.

Reform may well be in order. But it must be based upon careful review of the tribunal's statutory role and analysis of its performance based upon the records the parties put before it. Anything short of this will surely make things worse.

One must appreciate the nature of the tribunal's work. It sets fees for intellectual property created by a population of artists as diverse as our culture. It then allocates the collections among competing claimants.

The tribunal inherited three low-balled statutory rates which were nothing more than political compromises. The legislative history of the two-and-three-quarter-cent song fee for "mechanical recordings" shows that Congress rejected a proposal to maintain that rate pending the occurrence of "relevant factors" after enactment. The $8 fee set for each jukebox for each year was absurdly low. The statutory fees for cable television signals were premised upon the FCC's anti-cable operator restrictions of distant-signal carriage and the syndicated program deletion option given to local broadcasters. The new tribunal was directed to commence proceedings to adjust the phono record and jukebox fees to make them "reasonable." The cable television fees were to be adjusted, again to be "reasonable," when the FCC's anticipated deregulation steps took place.

It was assumed that substantial upward adjustments of fees would occur. But the tribunal was given only very blunt instruments to [illegible]

[illegible] copyright li-

Bruce G. Forrest joined the Washington office of the Oakland, Calif., law firm of Farrow, Schildhause, Wilson & Rains in December 1984. Before that he was with the appellate staff of the Justice Department's civil division. While at Justice, Forrest defended a number of the Copyright Royalty Tribunal's administrative decisions before the courts.

censes is not like setting rates for a public utility. The tribunal is not determining a reasonable rate of return on capital investment, or remunerating the cost of service.

For cable television, Congress was even less helpful. The tribunal was specifically told only to consider the "economic impact" on copyright owners and users in setting the new fee after repeal of the FCC's distant-signal rules. And for its distribution cases, Congress candidly declined to give the tribunal any guidelines at all.

The tribunal's struggles to explain "in detail" the reasons for its decisions have been met with scorn. But anyone who participated in drafting this statute should be dissuaded—or at least embarrassed—from criticizing the tribunal for vagueness.

In the first two tribunal rate proceedings (the "mechanical fee" for the record industry and the juke box fee), the copyright users largely relied upon an attempt to impose a burden of proof on anyone seeking to change the statutory fee levels, and poormouthing about the plight of their industry. But by any measure those fees were inadequate. If inflation alone were used to adjust the mechanical phono record fee, it would have risen to 14 cents per song. The jukebox fee was a small fraction of comparable fees charged in a wide variety of western nations. No one should have been surprised when the agency declined to impose a burden of proof on copyright owners or when it refused to re[illegible] copyright owners' [illegible] copyright users by supressing rates.

Counsel for the cable industry were fully aware of these matters when the tribunal entered its most controversial proceeding: the setting of cable rates in light of FCC deregulation. The cable operators put on an affirmative case to show that the rates were already high enough. But this presentation was successfully rebutted by the coordinated presentations of many copyright owners' groups. They proved overwhelmingly that a very substantial rate increase was in order.

The reviewing courts have unanimously affirmed the tribunal's rate decisions substantially in their entirety. The reviewing courts were correct because there was ample evidence of record to support tribunal decisions.

Whether the compulsory licenses should be abolished is a policy question beyond the purview of this note. But proposals to keep the compulsory licenses, and to replace the tribunal with a Federal Copyright Agency ("Cablecasting," June 3), or move its function to the Department of Commerce or the Library of Congress, should be scrutinized most carefully. In absence of changes in the substantive statutory guidelines, it should not be assumed that a different decision maker would have made a substantially different decision. Based on the records I've seen, the tribunal's decisions were not at all surprising.

The worst route, which all interests should avoid, is the delegation of any initial decisional authority to the courts. Any lawyer familiar with the range of personalities and judgments available from the judicial branch will shudder (perhaps gleefully) at the prospect of courthouse shopping battles — ideally, legislation will fix compulsory license fees and negotiation will divide the pool. The cable television fee schedule, especially, needs revision. Even if overall receipts are maintained, the schedule is too rococo, and it dictates results based more on history than economic reality.

Meanwhile, absent statutory change, copyright users should still be able to substantially improve their evidentiary showings before the agency. The tribunal has discounted the "marketplace" analogies presented by copyright owners, finding the resulting fees would be unfairly high. Certainly some effort should be made to better quantify the value of these differences. Experience with current fee levels should provide valuable information as to whether those fees were set at levels that were too high or too low.

But absent statutory changes or improved administrative presentations, don't expect new commissioners or new bureaucratic structure to satisfy complaints about performance under the statute.

ATTACHMENT B

ACTUAL EXPENDITURES COMPARED TO APPROPRIATED BUDGETS

Fiscal year	Authorized budget	Actual expenses	Unobligated allotment
1977	[1] $276,000	$32,351	243,649
1978	[2] 726,000	469,775	256,425
1979	805,000	485,979	319,021
1980	[3] 471,000	461,196	9,804
1981	470,000	437,640	32,360
1982	487,000	476,614	10,386
1983	626,000	555,440	70,560
1984	[4] 700,000	480,064	219,936
1985	[5] 722,000	459,250	262,750
1986	[6] 512,000	509,374	2,626
1987	[7] 629,000	579,463	49,537
1988	[8] 662,000	611,000	51,000
1989	[9] 633,000	598,000	35,000
1990	[10] 674,000	673,500	500
1991	[11] 845,000	862,000	3,000
1992	[12] 865,000	863,700	1,300
1993	[13] 911,000		

[1] Expenses were for purchase of office furniture and equipment only.
[2] Expenses were for 10 months operation only.
[3] Tribunal decreased positions from 18 to 10.
[4] Tribunal authorized 11 positions. Vacancies created by the death of Mary Lou Burg and resignation of Katherine D. Ortega and their respective assistants were not filled until late fiscal year 1984. Ratio of appropriated funds to royalty funds 30 percent/70 percent.
[5] Authorized 11 positions. Ratio of appropriated funds to royalty funds 30 percent/70 percent.
[6] House Committee on Appropriation authorized funding for 3 commissioners, 3 assistants and a general counsel. Ratio of appropriated funds to royalty funds 30 percent/70 percent.
[7] Ratio of appropriated funds to royalty funds 20 percent/80 percent.
[8] Authorized 8 positions (3 commissioners, 3 assistants, 1 general counsel, secretary to general counsel. Ratio of appropriated funds to royalty funds 20 percent/80 percent.
[9] Authorized 8 positions. Ratio of appropriated funds to royalty funds 20 percent/80 percent.
[10] Authorized 9 positions. Ratio of appropriated funds to royalty funds 15 percent/85 percent.
[11] Authorized 10 positions. Ratio of appropriated funds to royalty funds 15 percent/85 percent.
[12] Tribunal requested elimination of 1 position (legal researcher); authorized 9 positions. Ratio of appropriated funds to royalty funds 15 percent/85 percent.
[13] Authorized positions 9. Ratio of appropriated funds to royalty funds 14 percent/86 percent.

ATTACHMENT C

Section 809 of the Copyright Act provides for the timely distribution of royalty fees that are not subject to all appeal, and where royalties would not be affected by an appeal under any circumstances. Each year since the Copyright Act of 1976 became effective on January 1, 1978, the Copyright Office has maintained the jukebox and the cable copyright royalty funds and the Tribunal. The funds are comprised of two elements: the deposits by the copyright users (less the administrative costs of the Copyright Office and the Tribunal) and growth on investment of the funds. The Tribunal has disbursed the following royalty fees.

STATUS OF ROYALTY FEE FUNDS DISTRIBUTED

Royalty fee fund	Doller amount	Percent distributed	Percent held in Reserve
Cable			
1978 Cable Royalty Fund	$ 17,689,000	100.00	
1979 Cable Royalty Fund	23,764,000	100.00	
1980 Cable Royalty Fund	28,083,000	100.00	
1981 Cable Royalty Fund	35,595,000	100.00	
1982 Cable Royalty Fund	44,384,000	100.00	
1983 Cable Royalty Fund	84,369,000	100.00	
1984 Cable Royalty Fund	104,355,000	100.00	
1985 Cable Royalty Fund	114,405,000	100.00	
1986 Cable Royalty Fund	130,024,000	100.00	
1987 Cable Royalty Fund	174,333,000	100.00	
1988 Cable Royalty Fund	209,660,000	100.00	
1989 Cable Royalty Fund	228.459,000	100.00	

STATUS OF ROYALTY FEE FUNDS DISTRIBUTED—Continued

Royalty fee fund	Dollar amount	Percent distributed	Percent held in Reserve
1990 Cable Royalty Fund	180,107,000	90.00	10.00
1991 Cable Royalty Fund	185,066,000		100.00
Jukebox			
1978 Jukebox Royalty Fund	$1,122,000	100.00	
1979 Jukebox Royalty Fund	1,360,000	100.00	
1980 Jukebox Royalty Fund	1,228,000	100.00	
1981 Jukebox Royalty Fund	1,183,000	100.00	
1982 Jukebox Royalty Fund	3,320,000	100.00	
1983 Jukebox Royalty Fund	3,166,000	100.00	
1984 Jukebox Royalty Fund	5,992,000	100.00	
1985 Jukebox Royalty Fund	5,508,000	100.00	
1986 Jukebox Royalty Fund	5,351,000	100.00	
1987 Jukebox Royalty Fund	6,535,000	100.00	
1988 Jukebox Royalty Fund	6,732,000	100.00	
1989 Jukebox Royalty Fund	6,442,000	100.00	
1990–1999 (License Suspended)			
Satellite			
1989 Satellite Royalty Fund	$2,698,000	100.00	
1990 Satellite Royalty Fund	3,457,000	100.00	
1991 Satellite Royalty Fund	3,762,000	100.00	

ATTACHMENT D

APPEALS

Cable decisions

National Association of Broadcasters v. *Copyright Royalty Tribunal,* 675 F.2d 367 (D.C. Cir. 1982) (1978 cable distribution). Remanded to explain non-award to NPR, affirmed in all other respects.

National Cable Television Association v. *Copyright Royalty Tribunal,* 689 F.2d 1077 (D.C. Cir. 1982) (1980 cable inflation adjustment). Remanded to explain or correct mathematical formula for inflation adjustment, affirmed in all other respects.

Christian Broadcasting Network, Inc. v. *Copyright Royalty Tribunal,* 720 F.2d 1295 (D.C. Cir. 1983) (1979 cable distribution). Remanded to explain non-awards to Devotional Claimants and to Commercial Radio, affirmed in all other respects.

National Cable Television Association v. *Copyright Royalty Tribunal,* 724 F.2d 176 (D.C. Cir. 1983) (3.75 percent and syndicated exclusivity surcharge). Affirmed.

National Association of Broadcasters v. *Copyright Royalty Tribunal,* 772 F.2d 922 (D.C. Cir. 1985), *cert. denied,* 106 S. Ct. 1245 (1986). (1979 remand, 1980 remand and 1982 cable distribution). Affirmed.

National Association of Broadcasters v. *Copyright Royalty Tribunal,* 809 F.2d 172 (2d. Cir. 1986) (1983 cable distribution). Affirmed.

National Association of Broadcasters v. *Copyright Royalty Tribunal,* 848 F. 2d 1289 (D.C. Cir. 1988) (1984 cable distribution). Affirmed.

ACEMLA v. *Copyright Royalty Tribunal,* 854 F.2d 10 (2d Cir. 1988) (1983 cable distribution). Affirmed.

Jukebox decisions

Amusement and Music Operators Association v. *Copyright Royalty Tribunal,* 636 F.2d 531 (D.C. Cir. 1980) (1978 regulations on access to jukebox). Dismissed for lack of jurisdiction.

Amusement and Music Operators Association v. *Copyright Royalty Tribunal,* 676 F.2d 1144 (7th Cir. 1982) (1980 jukebox royalty rate). Affirmed.

ACEMLA, Latin American Music and Latin American Music, Inc. v. *Copyright Royalty Tribunal,* 763 F.2d 101 (2d Cir. 1985) (1982 jukebox distribution). Remanded to ascertain whether appellants were performing rights societies or copyright owners.

ACEMLA v. *Copyright Royalty Tribunal,* 809 F.2d 906 (D.C. Cir. 1987) (1982 remand/1983 jukebox distribution). Affirmed.

ACEMLA v. *Copyright Royalty Tribunal,* 835 F.2d 446 (2d. Cir. 1987) (1984 jukebox distribution). Affirmed.

ACEMLA and Italian Book Corporation v. *Copyright Royalty Tribunal,* 851 F.2d 39 (2d Cir. 1988) (1985 jukebox distribution) Affirmed.

Mechanical decisions

Recording Industry Association of America v. *Copyright Royalty Tribunal,* 662 F.2d 1 (D.C. Cir. 1981) (1980 mechanical rate adjustment). Remanded to consider alternative scheme for interim rate adjustment which would not require agency discretion in a year outside of the ratemaking year set by Congress, affirmed in all other respects.

Senator DECONCINI. Ms. Daub, thank you for your statement and your perspective on this. You have a lot of experience there and we appreciate that.

For the record, following your remarks I will put in a letter from National Public Radio pointing out—they make some suggestions on the bill. We did not ask them to be a witness. They do not oppose the bill in this letter, and I am advised that they do not oppose it, but they are making some suggestions. I might say, they seem to be very good suggestions.

Senator DECONCINI. Mr. Goodman?

STATEMENT OF BRUCE GOODMAN, COMMISSIONER, COPYRIGHT ROYALTY TRIBUNAL, WASHINGTON, DC

Mr. GOODMAN. Thank you, Mr. Chairman, Senator Grassley. Thank you for inviting to me appear today.

My name is Bruce Goodman. I am a Commissioner on the Copyright Royalty Tribunal, and I am a member of the majority of the Tribunal which supports S. 1346 and favors the establishment or arbitration panels to replace the Copyright Royalty Tribunal.

With the benefit of 16 years' hindsight, we now know that the Tribunal simply does not have enough work to justify a full-time Government agency. The easiest and best measurement of our activity is the number of days on which the Tribunal has conducted hearings. In fact, Congress, in drafting the enabling legislation, chose to change our name from the originally-proposed Copyright Royalty Commission to the Copyright Royalty Tribunal to emphasize that the Tribunal was created for the primary purpose of conducting hearings and adjudicating disputes.

But the Tribunal has not met the expectation of Congress. In my first year we did not conduct a single day of evidentiary hearings. One full year, not one day of hearings. In fact, after the Tribunal concluded its last hearing, there was a span of more than 20 months before the next evidentiary hearing—20 months, not one day of hearings.

Simply stated, the Tribunal has fallen far short of meeting the burden of justifying its continued existence. It may be true that "those also serve who stand and wait," but neither the taxpayers nor the copyright owners should have to foot the bill.

Although the Tribunal's cost is comparatively modest, the effort to balance America's budget must start with smaller agencies, such as the Tribunal. This is the philosophy inherent in the Vice President's campaign to reinvent Government and the efforts of prior Administrations to deregulate Government and streamline the bureaucracy. Hopefully our actions today will stimulate other appointees and other legislators to recommend meaningful cuts in their departments, agencies, and areas of responsibility or oversight.

Shifting the burden of funding the Tribunal to the copyright owners does not solve the problem. First, every Government agency requires numerous "soft" costs, such as lengthy and expensive security checks of each Commissioner, and appropriation hearings by Congress. Moreover, the copyright owners will simply pass along their costs to stations, advertisers, viewers, listeners, and, ultimately, the consumers and taxpayers.

We must face reality and recognize that the continued existence of any agency or governmental program inherently and inevitably is going to cost the taxpayers money, and in the case of the Tribunal, it is money not well spent. Perhaps a problem was inevitable. The Tribunal was not only given few responsibilities, but they were primarily quasi-judicial in nature; thus, the Tribunal is doomed to inefficiency because the nature of litigation guarantees an unpredictable and inconsistent workload. Without typical administrative responsibilities, the Tribunal cannot fill in the gaps. Accordingly, the concept of arbitration panels makes eminently good sense: when there is no work, there will be no costs.

As Commissioner Daub stated, the CRT went through difficult times in the mid-1980's. She did not mention, however, the proposed Copyright Tribunal Sunset Act, the title of which left little doubt as to the level of frustration with the Tribunal. Or that Congressman Kastenmeier, who had midwifed the Tribunal into existence only 8 years before, described the agency as "broken beyond repair" and also introduced legislation to abolish the Tribunal. At least two former Commissioners have advocated abolition of the CRT, and today a majority of the CRT supports the legislation to transfer the Tribunal's responsibilities and sunset the agency.

After my support for the bill became public, I was asked why I joined an agency, only to later support its abolition. The question is perhaps cynical, but it is not inappropriate. In fact, before I accepted, I declined the offer on three occasions. I cited the agency's poor reputation and I questioned whether its workload was adequate to justify its existence. The response of the White House Office of Personnel was disarming and convincing in its candor. They agreed with me and stated that they intended to fix the problem by appointing Ed Damich, a professor and expert on copyright law, and by appointing me, based on my legal and business experience in the communications industry. They felt we would work well together and would rehabilitate the image of the Tribunal.

I was flattered by the offer and the challenge, enthusiastic about the opportunity to serve my country, anxious to disbelieve the criticisms of the Tribunal, and committed to making the Tribunal responsive and helpful to the taxpayers and to the owners of copyrighted programming. But I quickly recognized that I had allowed my optimism to triumph over the reality that there was painfully little to do. Once the bill was submitted in the House and the three Commissioners were asked to testify, I had only three choices: one, abstain; two, perjure myself and state that the Tribunal earned its keep; or, three, tell the truth.

I elected to testify truthfully then, and I am telling the truth again today. After 16 years of underperforming, the Copyright Royalty Tribunal should be allowed to sail into the sunset and its func-

tions should be transferred to arbitration panels, appointed and convened by the Librarian of Congress.

Thank you.

[The prepared statement of Mr. Goodman follows:]

PREPARED STATEMENT OF BRUCE D. GOODMAN

SUMMARY

The Copyright Royalty Tribunal is an inherently and inevitably inefficient agency which has not fulfilled its purpose or the needs of the taxpayers, consumers or copyright owners. Accordingly, the Tribunal should be sunset and its functions transferred to arbitration panels appointed and convened by the Librarian of Congress.

The recommendation to sunset the Tribunal and re-assign its functions is based on the following:

- Workload. The Tribunal's workload is inconsistent and, too frequently, insignificant because its responsibilities are limited; and the unpredictable nature of litigation obviates the possibility that the Tribunal can operate at an acceptable level of efficiency and productivity.
- Agency expertise. Qualified and experienced arbitrators will improve the adjudication and rate-making processes.
- Government efficiency. Arbitration panels will increase productivity, reduce bureaucracy, and eliminate costs.
- Value. The Tribunal cannot justify its costs to either the parties or the taxpayers based on a cost/benefit analysis.
- Settlement. Motivated by the opportunity to save substantial costs, the parties will be more inclined to settle their disputes.

I. INTRODUCTION

Mr. Chairman and members of the Subcommittee, my name is Bruce D. Goodman; I have been a Commissioner on the Copyright Royalty Tribunal since September 1992. I am a member of the Tribunal's majority which supports S.1346—the Tribunal should be sunset and its functions transferred to arbitration panels appointed and convened by the Librarian of Congress. The Tribunal has not fulfilled its promise or the needs of the taxpayers, consumers, or copyright owners and, after 17 years, it is unlikely to do so.

II. BACKGROUND

As set forth in the Legislative History, the Copyright Royalty Tribunal was created as an independent federal agency in the legislative branch to determine, review and adjust certain royalty rates for use of copyrighted materials pursuant to compulsory licenses provided in the Copyright Act of 1976. Initially, a bill in the Senate provided that, upon certifying the existence of a controversy concerning distribution of statutory royalty fees or upon periodic petition for review of statutory royalty rates by an interested party, the Register of Copyrights would convene a three member panel to constitute a Copyright Royalty Tribunal for the purpose of reviewing the controversy or reviewing the rates. According to this bill, the Tribunal would be appointed from among the membership of the American Arbitration Association or a similar organization; but the Tribunal would exist within the Library of Congress.

Due to constitutional concern over the provision of a Senate bill that the Register of Copyrights, an employee of the legislative branch, would be appointing members of the Tribunal, the bill was amended to provide for the direct appointment of the Commissioners by the President. The first Chairman was the well-qualified Thomas C. Brennan, who had been the Chief Counsel of the Subcommittee on Patents, Trademarks, and Copyrights throughout the consideration of the enabling legislation. Thereafter, the Tribunal went downhill.

In fact, Rep. Robert Kastenmeier (D–Wisc.), who was one of the primary driving forces behind the establishment of the Tribunal in 1977, less than 10 years later described the Tribunal as "broken beyond repair" and introduced legislation to create a Copyright Royalty Court to perform the Tribunal's functions. The Kastenmeier bill followed the "Copyright Royalty Tribunal Sunset Act", a bill introduced by Rep. Mike Synar (D–Okla.) to transfer the Tribunal's responsibilities to the Librarian of Congress and whose title left little doubt as to the level of frustration with the Tri-

bunal. Senator Dennis DeConcini (D–Ariz) told a group of cable executives in 1985 that, "If I were in your business, I would be frustrated as holy hell". One former chairman, herself a controversial commissioner who resigned under pressure, testified subsequently that the Tribunal should be eliminated because it was "effectively paralyzed", was "totally useless", "totally unjust" and, throughout its history, had established a precedent for "incompetence, ineffectiveness, and apathy". In fact, she even added "apparent corruption" to its impressive list of evils. Another former commissioner more quietly called for its abolition. On March 3, 1993 before the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee and, again today, a majority of the Tribunal has endorsed the abolition of the Tribunal.

Notwithstanding this dubious history, I allowed my optimism to triumph over reality when I accepted the appointment to the Tribunal in 1992. I looked forward to working with Professor Edward J. Damich, who I had been told would be appointed to the Tribunal with me; and I believed that the Tribunal would be perfectly located in the crossroads between fast-evolving communications law and exciting new concepts in copyright law. I expected to be right in the middle of the activity, watching compulsory copyright, must carry, retransmission consent, DART, and all the others exciting copyright/communications issues play out before my eyes. With millions of dollars at stake and a skilled bar representing the parties, it seemed to be the right place and the right time. But the place turned out to be a bureaucratic Brigadoon; the time was when the villagers were not awake; and if the Tribunal had a theme song, it would be"Don't Stop Thinking About Yesterday".

III. PROBLEMS OF THE TRIBUNAL

With the benefit of 20:20 hindsight, we can now see that the Tribunal, although well-intentioned, was flawed from start to finish. From conception through execution.

A. Workload

The Tribunal's workload is inconsistent, episodic, and, too frequently, insignificant due to the following:

1. Limited responsibilities. Although, on paper, the Tribunal's list of responsibilities appears significant, if not impressive, settlements are common (e.g., agreement was reached by the parties entitled to cable compulsory copyright distributions under Section 111 for 1983 through 1988; and agreement was reached by the parties under Sections 116 for the jukebox industry for 1990 through 1999).

2. The nature of litigation. The Tribunal's overwhelming and primary responsibility is quasi-judicial. However, the workload regarding any individual compulsory license is inherently and inevitably unpredictable. As is true with litigation in any forum, a case tried to completion requires a significant expenditure of time, but if a case settles quickly, there is little for the arbiter to do other than approve the settlement agreement. Thus, in the case of the Tribunal, if the parties settle their disputes, there may be virtually nothing for the Tribunal to do during the year.

B. Agency expertise

Each year, a pool of royalty payments which can exceed $200 million must be allocated among claimants to the cable compulsory copyright license royalties. Literally hundreds of claimants coalesce into claimant groups with a commonality of interest to pursue their claims. Highly-skilled attorneys with an expertise in copyright/communications law submit articulate, albeit legalistic, briefs outlining and arguing the legal and factual issues by citing detailed and complicated legal precedent and positioning the factual evidence in the most persuasive way. They present complex evidence in hearings with direct and cross examination of the witnesses. Every positive nuance is carefully coaxed out of friendly witnesses just as subtle, but damaging, admissions are elicited from hostile witnesses. The attorneys paint their evidence on a broad canvas using barely-perceptible brush strokes that are visible only to the well-trained and highly experienced legal eye.

To a legal scholar or at least an experienced attorney, the issues are fascinating, stimulating, compelling, and challenging. But to a layman, the same issues must be bewildering, confusing, boring, and mind-boggling. To the parties and their lawyers, with so many millions at stake, it all must simply be frustrating.

Ideally, the Tribunal commissioners—who must resolve factual issues and make legal judgements—will be appointed based on their experience and expertise in copyright, communications, and entertainment law. Some litigation experience is beneficial, but an economic or legal background is essential.

Certainly, it is unreasonable to expect that every commissioner will possess all this experience. But, shockingly, until this year, the appointees had little or no experience in copyright law or communications law or entertainment law or any law at all—few were attorneys. It is the height of naive and blind optimism to expect an inexperienced layman to decipher legal and industry jargon; grasp and resolve the legal and factual issues; and—in the instance of the chairman—run the hearing.

Clearly, Congress envisioned that the Tribunal would consist of an experienced group of attorneys-as-arbitrators who would hear evidence and write the decisions. The legislative history reveals the specific intent of Congress that "the Commissioners perform all professional responsibilities themselves," as assisted by a small secretarial and clerical staff. However, in 1985, in the midst of a blitzkrieg of criticism, a general counsel was added to the Tribunal following the recommendation of the Government Accounting Office, which was concerned with the quality of the Tribunal's decisions and the qualifications of its commissioners. In fact, the House Subcommittee on Courts, Civil Liberties and the Administration of Justice held hearings on the future of the Tribunal. During this time, the GAO; the acting Register of Copyrights; and a number of expert witnesses proposed that the existing Tribunal should be modified by establishing legislative qualifications for commissioners.

Neither political party bears the sole blame for exalting the politically faithful over the experienced and the qualified. In fact, each administration during the Tribunal's lifetime has apparently looked upon the Tribunal as a place more appropriate to reward its friends than to staff with experts. Numerous observers have found it both disheartening and puzzling to note the politicizing of the process of appointing commissioners to an agency which has absolutely no political agenda or even input into traditional politics. The issues before the Tribunal are consistently apolitical and their resolution cannot be considered to benefit either political party. Although there have been dedicated and qualified commissioners on the Tribunal; too often the appeal of a seven year term with little work, less pressure, and no heavy lifting has proven to be an irresistible attraction for un-or underqualified jobseekers with a friend in the oval office.

C. The workproduct

The discontent of the parties with the Tribunal's decision-making ability is manifest from the many appeals and critical comments in past hearings to abolish the agency. As a result of the politicizing of the appointment process, the parties or claimants are caught in a frustrating catch-22. They can't go to the federal courts until they have proceeded before the Tribunal. Then, if they appeal, which they do with an alarming and telling frequency (for example, of the first six cable distributions, five were appealed), the courts—without examining the background of the Tribunal's commissioners—routinely cite the traditional agency's "administrative efficiency and expertise" and refuse to overturn the Tribunal's findings. (See, e.g., *National Association of Broadcasters* v. *Copyright Royalty Tribunal,* 675 F.2d 367 (D.C. Cir. 1982). As a practical matter, the claimants, i.e., the parties which appear before the Tribunal, are unable to express their candid opinions of the Tribunal before the appellate courts, before Congress or in any other forum because statements critical of the commissioners and their decisions could ill-serve the parties at hearing time. As a result, the parties are captives in a frequently non-working and unworkable system and there is little they can do to alleviate their problems.

D. Value

1. Hard and soft costs. It is the Tribunal's *value,* not its actual costs to the taxpayers which makes appropriate its abolition. The Tribunal's total budget is small—approximately $1,000,000 of which the claimants pay approximately 86 percent. There are, however, more substantial hidden or soft costs—the process of appointing Commissioners starts with letters and calls to members of Congress, then letters and calls to the White House. The calls bounce back and forth; the messages work their ways up and trickle down. The Office of Presidential Personnel becomes involved; there are interviews, recommendations, FBI security checks, hearings before the Judicial Committee, meetings with the Office of Government Ethics; and reams of paperwork to complete and review. After confirmation, there are meetings with the Appropriations Committees, more paperwork, and all the other hidden expenses and meetings which rob the government of its time.

Even if the parties are required to pay 100 percent of the Tribunal's hard costs, the soft costs would not disappear. And the parties would question whether it was money well spent. It is perhaps the ultimate indignity which is imposed on copyright owners—first, their intellectual property is appropriated without their consent; then, they are forced to fund the process of administering the compensation for the

appropriated property. At the very least, the government should provide the best arbiters and the most efficient process to maximize the possibility of the most equitable result and minimize the cost.

2. Costs to the parties. Even if the parties are required to pay 100 percent of the Tribunal's hard costs, the soft costs would remain. And, given their frequent criticism of the Tribunal's decisions, the parties are unlikely to consider the money well-spent. In fact, the parties may be saddled with the ultimate indignity—not only does the government appropriate their intellectual property without their consent, but they are forced to fund the agency responsible for that appropriation. Even if the parties settle their issues and the Tribunal does literally no work related to them, the parties must still fund almost all the Tribunal's $1 million budget.

However, if the parties pay only for *ad hoc* arbitrators, there will be no adjudication costs if there is no arbitration. Thus, the parties will save: (i) hundreds of thousands of dollars in legal costs; and (ii) perhaps a million dollars in costs otherwise paid to the Tribunal.

3. Cost/benefit analysis. More significant than the Tribunal's hard and soft costs is its abysmal failure under a cost/benefit analysis. That is, one must examine whether the benefit the Tribunal provides justifies its costs. To ask that question is to answer it—even though the Tribunal's costs are low.

Apparently, based on a twist to the old saw that "you get what you pay for," the Tribunal's attitude seems to be that, since the parties and the taxpayers don't get very much, if they don't pay very much either, it's all OK. It seems similar to a movie theater which shows "B" movies, but charges only a dollar because the movies aren't very good. But there is a major difference—in the marketplace of capitalism, if you don't like the "B" movie playing at the dollar theater, you can walk down the street to the Bijou and see the latest blockbuster for $7. The choice is yours. But the taxpayers and the claimants don't get a choice with the Tribunal. There is no marketplace. What Congress has decreed is what they get.

Although critics of the Tribunal have recommended that additional staff and money were needed for the agency to run smoothly, expenses have been moderated—in accordance with economic necessity and, perhaps, the Tribunal's view of its own worth. As a result, there is no library, no access to electronic data bases, and virtually no budget for travel or seminars. Consequently, the commissioners (many of whom had little or no experience before joining the Tribunal) have little chance to learn on the job and the public is not adequately informed of the opportunities to participate in the agency's allocation of royalties. The Tribunal's responsibility under the Audio Home Recording Act is a case in point. Unless Slash, one of the leads with the heavy metal group Guns n' Roses, happens to catch the right edition of the *Federal Register,* he may be unaware of his opportunity for royalties for his performances.

4. Spending, bureaucracy, and the economy. It is clear that America's deficit must be reduced and I firmly believe that spending cuts must lead the way. The challenge to cutting spending is the ability to wield the knife in a way that the fat is excised, but the bone is left intact. Although the Tribunal's caloric total is not high, the calories it does have are largely empty—in a nutritional pyramid, the Tribunal would fall somewhere between Jell-O and Doritos. Just as a dieter must count his calories one at a time, Congress and the Executive Branch must eliminate every unnecessary expenditure. When America's deficit exceeds the GNP of most other nations and continues to grow rapidly, there is no such thing as a governmental expense that is *de minimis.*

This concept is so well-accepted that it has spawned numerous aphorisms that have become trite through popularity e.g. "If you watch the pennies, the dollars will take care of themselves"; "the journey of a thousand miles begins with a single step."

There is simply too much government—the bureaucracy must be streamlined if we are to remain competitive in a global economy. The President has challenged America to name specific governmental expenditures which can be cut and the Vice President has appealed to Congress and the taxpayers to "re-invent government." By identifying the Tribunal, Congress has accepted that challenge. Certainly, it is doubtful that anyone inventing the government in 1993 would include the Tribunal in the master plan. Abolishing the Tribunal and re-assigning its functions in a cost-efficient manner is a step in the right direction and, hopefully, will take America on the multi-billion mile journey to cure the deficit. Arbitration panels under the aegis of the Library of Congress provide a half-way pint between government bureaucracy and privatization. The resulting savings will be significant.

E. Conclusion

The Tribunal's problems are pervasive, systemic, inevitable, and insoluble. The agency was fatally flawed in its conception and irresponsibly treated in its execution.

1. The tribunal's conception. The concept could not possibly have worked efficiently because a small government agency cannot possibly act as an efficient adjudicator of a limited number of issues which arise in an irregular and unpredictable fashion. As the workload ebbs (e.g., the claimants settle), the Tribunal is underutilized; and even if the workload were to flow (e.g., none of the claimants settle), the limited Tribunal resources would be swamped and unable to cope. Due to its narrow mission, the Tribunal cannot expand into other work during the times that are fallow for litigation. And due to its small staff and limited resources, the agency cannot delegate or re-assign other work within the small agency if it is confronted by a work overload (admittedly, an oxymoron when used in conjunction with the Tribunal).

Certainly, small agencies are capable of functioning very effectively—but they must have workloads that are consistent and predictable. For example, an agency to prepare for the nations Bicentennial or an Olympics Committee. But no agency can be efficient where there are not enough people or there is not enough work to smooth the mountains and valleys.

2. The tribunal's execution and implementation. Exacerbating the problems inevitably flowing from the flawed concept has been the dismal execution and implementation of the legislation. A candid and unbiased post-mortem would reveal that everyone concerned shares in the blame for the Tribunal's inevitable failure:

a. The presidents of both parties, who, too often, failed to demand even the most basic credentials in their appointees;

b. Congress, which created an agency with a mission that was too small and a workload that was too unpredictable; and failed, first, to include a requirement of appropriate experience in the Act and, then, regularly approved unqualified appointees, In fact, in 1985, Senator Charles Mathias, told a group of cable executives that, "If you blame anyone, you've got to blame us."

c. the claimants, which have grown to expect the worst and have passively watched their expectations confirmed; and

d. the appointees, who—eager for a seven year sinecure—accepted positions for which they knew they were not qualified.

Possibly, the fault even extends to the voters and the political and governmental system, itself, which tolerates this poor use of the taxpayers money and the abuse of the patronage system. In any event, the underutilization of the Tribunal and the appointments of unqualified commissioners has been so depressingly consistent that it is inexcusably naive to expect an improvement in the future.

Instead, the Tribunal is inevitably doomed to continue along its past unsatisfactory course. Wishing it all will be better won't make it so. That is the one lesson that can be learned from the Tribunal's 17 year history. As Santayana warned, "those who ignore the past, are condemned to repeat it." The Tribunal should be sunset on December 31, 1993 or as soon as it renders its decision in the 1990 cable copyright license proceeding. And its functions should be reassigned to a panel of arbitrators appointed from a list submitted to the Librarian of Congress and convened by him.

IV. COPYRIGHT ARBITRATION ROYALTY PANELS

The responsibilities of the Tribunal—adjudication and rate-making—are ideally suited to alternate dispute resolution such as a panel of arbitrators.

A. Benefits

1. Efficiency. As stated above, litigation is inherently inconsistent and unpredictable. Accordingly, *ad hoc* arbitration panels can be appointed and convened by the Librarian of Congress only when necessary and dismissed after their decision is rendered or if the parties settle. Thus, the parties will be required to pay for only work rendered in their behalf, but not for an agency which "stands and waits." Due to the emergency nature of their work, fireman must be paid for their down-time. But the needs of copyright owners for a resolution of their difference are not so immediate to warrant instantaneous availability of arbiters.

2. Experience. By selecting arbitrators from lists submitted by the parties, the Librarian can guarantee that the arbitrators will be sufficiently experienced and credi-

ble to assure the parties that their complex arguments will be understood, analyzed, evaluated, and incorporated into the decision-making process.

3. Procedure. Arbitration is particularly appropriate to the legal/economic arguments and evidence presented by the parties. Whether the rules of the Administrative Procedure Act or the American Arbitration Association are applicable, they will be sufficiently flexible to give the parties the opportunity to get their evidence in without while permitting a thorough cross-examination.

4. Settlement. The parties will be more likely to settle because: (i) they can save the costs of the arbitrators (as well as their own lawyers); and (ii) they will be uncertain how a new arbitration panel will decide.

B. The librarian of Congress

Re-assignment to the librarian of congress makes eminently good sense because:

1. Legislative Branch. The Tribunal and the Copyright Office in the Library of Congress are both in the Legislative Branch;

2. Enabling Statue. The *Copyright* Act of 1976 is the enabling statue and the Copyright Office is responsible for administering the copyright laws; and

3. Administrative support.The Copyright Office's licensing division already provides administrative support for the Tribunal.

V. OVERALL CONCLUSION AND RECOMMENDATION

For the reasons stated above:

A. The tribunal should be sunset as an agency on December 31, 1993 or immediately after its decision is rendered in the 1990 Cable License proceeding; and

B. The tribunal's functions should be reassigned tocopyright arbitration royalty panelsappointed and convened by the Librarian of Congress.

Senator DECONCINI. Thank you, Mr. Goodman.
Mr. Midlen?

STATEMENT OF JOHN H. MIDLEN, JR., ESQ., COUNSEL TO THE DEVOTIONAL (RELIGIOUS) CABLE AND SATELLITE COPYRIGHT ROYALTY CLAIMANTS, WASHINGTON, DC

Mr. MIDLEN. Thank you, Mr. Chairman and Mr. Grassley. I am John Midlen and I represent the devotional claimants who are the owners of copyrights to syndicated television programming with a religious theme.

We do not believe that the answer lies in abolishing the Tribunal, or in establishing a system of arbitrators. I do not mean to be flippant at all when I say that the Librarian and the Register this morning perhaps presented a very compelling case as to why the functions should not be transferred to them. First of all, they don't want it; you could see that. Second of all——

Senator DECONCINI. Excuse me for interrupting, but I did not see that, that they did not want it. But you are entitled to your opinion, of course.

Mr. MIDLEN. Yes. They will accept the challenge, but clearly they don't relish the challenge, the activity.

What we, the devotional claimants, have done is take S. 1346 and have grafted into it comprehensive amendments which we hope will be introduced and which are attached to my testimony.

Senator DECONCINI. We will include that in the record and look at it very carefully.

Mr. MIDLEN. What these do, what we hope will be accomplished, is to significantly improve the Tribunal and make it a model Government agency, funded entirely from privately paid royalties. The

Tribunal now is busier than it has ever been in its recent history, and it is functioning effectively.

The bill, which we know, of course, originated in the House and has come over in the form of S. 1346, has any number of problems with it, some of which were recited by Mr. Mulhollan and Ms. Levering. The devotional claimants in their amendments believe that we can solve the problem with adoption of our amendments; that would be that the CRT be retained, and its entire budget is taken out of the royalties it distributes.

Our amended bill would add the standards, where applicable, of the Federal rules of evidence and the Federal rules of civil procedure, and would keep the protections of the Administrative Procedure Act. We would update the Copyright Act, which has numerous out-of-date section that refers to certain things that have to happen by 1982 or whatever. We would fix the Commissioners' terms at 6 years each, and rotate them, staggering them at 2-year intervals. We would reconcile the rotation of the chairmanship with those staggered terms.

The amendments that we have drafted would permit paper arbitration proceedings at the Tribunal, where appropriate, in cases other than the cable royalties.

We believe that the foregoing would encourage settlement among the parties in all the different types of proceedings that the Tribunal administers. This isn't to say that we will be successful in everything, that settlements will occur, but it will encourage them. And largely because elements of certainty and predictability will be injected into a function where it would not be the case with S. 1346 as written.

Senate bill 1346 in its present form is a chamber of horrors. You have heard the Deputy Librarian and the Acting Register tell you specifically where, in order to transfer the function to the Librarian, the proposed bill falls short, and their list was compelling, but it only displays part of the problem.

They touched on the recoupment of costs. It is true, S. 1346 as written only provides for recoupment of arbitration proceeding costs and for administrative expenses that apply to cable. Everything else that the Librarian does or would do comes out of the public till.

Now, the Librarian's responsibilities under S. 1346 as written are triggered by recommendations of the Register. It would appear that the Librarian is not empowered to act in the absence of these recommendations, and in some places in the bill it would appear that he is not empowered to act contrary to them. We know that this Register-Librarian scenario is designed to circumvent the problems enunciated in Buckley v. Valeo, but I submit that the bill may not accomplish that, and if it doesn't accomplish that, it won't be successful.

In the Copyright Reform Act of 1993, which was introduced in the spring, in February, S. 373 and H.R. 897, there were various updates of the Copyright Act. They are lost. They are gone. S. 1346 as——

Senator DECONCINI. Mr. Midlen, I'm going to have to ask you to summarize now.

Mr. MIDLEN. Okay. Well, you would lose the APA. You would have the Librarian making private rulings under the necessary procedural and evidentiary stuff that he has to do. There are no qualifications for the arbitrators that are put into the bill, other than the list of parties. Any one party could have two nominees be arbitrators. The fully documented record would be largely composed of—it would certainly contain blatant hearsay and speculation. The standard of proof is jettisoned. The bill confuses appellate jurisdiction with standards of judicial review.

And finally, because it has so many problems, it is just a roll of the dice and does not and would not encourage settlement among the parties.

Thank you, Mr. Chairman.

[Mr. Midlen submitted the following:]

PREPARED STATEMENT JOHN H. MIDLEN, JR., ESQ. COUNSEL, ON BEHALF OF THE DEVOTIONAL (RELIGIOUS) CABLE AND SATELLITE COPYRIGHT ROYALTY CLAIMANTS

SUMMARY

The Copyright Royalty Tribunal can and must be *reformed,* not abolished, in the way it is funded and operated.

- Funded *entirely* from the royalties it distributes.
- Strengthened procedurally by retaining APA and focusing its attention to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, where appropriate.
- Stagger its membership into three 6-year terms, expiring at two-year intervals and reconciling the rotation of the chairmanship therewith. Such would provide the current and each succeeding Administration with two agency appointments at no cost to the public.
- Provide for arbitration panels for matters of lesser importance than the Annual $200 Million Cable Royalty Distribution as necessary.
- Ensure due process in all proceedings, whether before the Tribunal Members themselves, or arbitrators.
- Devotional Claimants have proposed Amendments to S. 1346 which are attached to their testimony that would accomplish all of the above.
- Transferral of rate and distribution functions to the Librarian cannot be fully funded from the royalties administered, and S. 1346, as written, doesn't even try.
- Existing S. 1346 would give critical, unfair advantage to the largest claimant group, which would always have one and perhaps all of the arbitrators as its designee(s).
- Existing S. 1346 would give Librarian and/or Register unfettered discretion to conduct proceedings in unbridled fashion, with no meaningful judicial review.
- Existing S. 1346 ignores the fact that neither the Librarian nor the Register will necessarily have qualifications to make quasi-judicial rulings and that there are no criteria for selection of arbitrators.
- The "fully documented written record" will contain blatant hearsay and speculation, absent cross-examination.
- S. 1346, as written, will not be cost effective because it will discourage settlements in favor of a roll of the dice with each year's crop of new arbitrators who will be able to do pretty much as they see fit.

Mr. Chairman and Members of the Committee: Thank you for the opportunity to appear and address matters pertaining to the administration, determination and distribution of various copyright royalties. Specifically, I deal with S. 1346, known as the Copyright Royalty Tribunal Reform Act of 1993. S. 1346, and its companion H.R. 2840, would not reform the CRT but, rather, would abolish the Tribunal and transfer its function to the Librarian of Congress, implemented in most meaningful respects through the Register of Copyrights. We do *not* believe that the answer lies in abolishing the Tribunal or in establishing a system of arbitrators that may easily fall under the sway of the largest and most influential claimant group; rather we

believe the CRT should be reformed (as the name of the bill unequivocally states) and fully funded from monies it is charged with distributing.

The Devotional Claimants, who are owners of copyrights to syndicated television programming with a religious theme, have prepared comprehensive Amendments to the Copyright Royalty Tribunal Reform [Abolition] Act of 1993, S. 1346. These Amendments would truly reform the Copyright Royalty Tribunal into a model government agency, *funded entirely from the privately paid royalties it distributes.* The Devotional Claimants' proposed amendments to S. 1346 appear at Appendix A. Over the years, the Devotional Claimants have had to fight for every penny awarded them, including going to the Court of Appeals for reversal of a zero share; clearly, we are not here seeking to preserve a system that bestows upon us unjustified largess. With the amended S. 1346 that we are proposing it is our strong conviction that the Tribunal's future determinations will be more fully grounded in fairness to all claimant groups. Similarly strong is our sense that S. 1346 as written would march headlong in the other direction.

We believe that improvements need to be made in the way the CRT is funded and operated and that it is currently operating under an out-of-date statute and inadequate regulations. However, I must hasten to point out that the Tribunal is probably busier now than at any time in its recent history and is functioning effectively. This is not to say that we agree with all of its rulings in the proceeding it is currently conducting—the 1990 Cable Royalty Distribution—but it is to say that that proceeding, and others like it should be retained in the forum created for them, rather than being spun off to an entity whose focus is elsewhere.

If the Tribunal is reformed as the Devotional Claimants propose, we believe that the principles behind Reinventing Government and balancing the budget would be furthered, due process would be preserved and the current and each succeeding Administration would have, during each four year term, either one or two executive vacancies to fill at no cost to the taxpayers. We have taken a hard, calculating, look at how the royalties system works and how it might be improved. The result is the Amendments that accompany this testimony as to how to modify S. 1346 to best meet the needs of the various copyright owners without cost to the public.

We analyze below S. 1346 as it is currently written and as it would be written with our Amendments. The contrast is dramatic.

S. 1346 IN ITS PRESENT FORM

Positive attributes

1. The fourteen percent of the CRT budget that currently comes from public funds would be saved by the agency's abolition.

2. Proceedings would be only on paper, eliminating trial-type hearings (and the costs thereof).

Negative attributes

1. Only so much of the entire distribution of royalties process as is attributable to (i) "arbitration proceedings" or (ii) administrative expenses *for cable* in the event there is not a controversy, is borne by the claimant parties out of the royalties they receive. The rest would come from the public trough, presumably through the Library of Congress whose activity and responsibility in the distribution process would increase.

2. The Librarian's responsibilities are triggered usually by recommendations from the Register. It would appear that the Librarian is not empowered to act in the absence of such recommendations, or in some instances, contrary to them. This certainly is designed to circumvent *Buckley* v. *Valeo* and may be unlawful and ultimately unsuccessful in doing so.

3. The updates of the Copyright Act contained in Title II to the proposed Copyright Reform Act of 1993, S. 373 and H.R. 897, are dropped without explanation.'

4. Protections of the Administrative Procedure Act are dispensed with in that the Librarian, before convening an arbitration panel, may "make any necessary procedural rulings * * *." Obviously, the Federal Rules of Evidence and the Federal Rules of Civil Procedure, even by analogy, have no application.

5. The "necessary procedural or evidentiary rulings" need not be published, would not be precedential (they could vary from each other, from year to year or from Librarian to Librarian), are to be governed by no standards and would constitute private rulings known only to the parties and to the Librarian.

6. The Librarian of Congress is not an office one would expect the occupant of to be qualified to make procedural or evidentiary rulings. No qualifications for office of either the Librarian or the Register are contained in the bill.

7. With respect to the proposed arbitrators:

a. Their qualifications are not addressed, much less specified.

b. Any party that might have the ear of the Register could have two of its nominees selected, who in turn would select the third. The selection processes appear to be unreviewable, and subject to no standards other than the whims of the Register and the Librarian and the two arbitrators they recommend and select.

c. In a 5+ party proceeding (as the Cable Royalty Distributions have been), at least three parties are going to be left out in the arbitrator selection process.

8. The arbitration proceedings themselves dispense with all safeguards, such as the APA, and are to be conducted "in accordance with such procedures as they may adopt * * *."

9. The arbitrators' decisions are to based on, among other things, "a fully documented written record * * *." This is not defined and would undoubtedly contain blatant hearsay and speculation, unchecked by the opportunity for cross-examination. The CRT's rules of evidence and proceeding would expire and nothing would take their place, except whatever the Librarian or the arbitrators, or both, may dream up.

10. The remaining factors to influence the determinations of the arbitrators are prior decisions of the CRT, prior arbitration panel determinations and the Librarian's private rulings. There is nothing to indicate how much weight any should have, whether conflicts among the factors need to be resolved or whether departure from precedent, such as it may be observed, need be explained.

11. Traditional notions of the standard of proof are jettisoned. Sitting as a trier of fact, the CRT's obligation is to judge according to the preponderance of the evidence. This is the lowest level of proof that exists in the judicial or quasi-judicial process.[1] The arbitrators would not be held to this standard, or any other.

12. The Librarian can reject the product of the arbitrators if he or she finds it "arbitrary"—whatever that means. He or she then may substitute his or her own judgment, which appears to be insulated from review on appeal if he or she merely makes a "full examination of the record created in the arbitration proceeding * * *." The Librarian is subject to no rules of substance, evidence or procedure, much less precedent.

13. Appeal is limited to the District of Columbia Circuit. This limitation appears to be irrational as the race to the courthouse has already been abolished: appeals in multiple circuits are consolidated to one circuit by lot.[2]

14. The bill confuses appellate jurisdiction with the standards of judicial review, *e.g.*, arbitrary and capricious or unsupported by substantial evidence.

15. It is inconceivable that the Court of Appeals, given it existing workload, would ever undertake a *de novo* examination of the record and modify the decision below on its own, as it views the record. Moreover, as S. 1346 is written, the Court may only remand determinations of the arbitration panels, not those of the Librarian.

16. Finally, and as a consequence of the many negative implications iterated above, the current S. 1346 would discourage settlements because each year would be a roll of the dice; for who knows what precedent may be discarded, what the court might do or how much leverage one would have simply by holding the smaller parties hostage to the horrors of the system envisioned.

S. 1346 WITH DEVOTIONAL CLAIMANTS' AMENDMENTS

Positive attributes

1. CRT is retained and its entire budget, *i.e.*, the cost of all royalty distributions and fee determinations, comes from the royalties distributed (proportionately paid by the claimants therefor out of the monies disbursed). No more public dollars would be expended.

2. Adds the standards, where applicable, of the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Retains the protections of the Administrative Procedure Act.

3. Updates the Copyright Act as is proposed in S. 373 and H.R. 897 (exclusive of matters dealt with in Title I thereof).

4. Fixes six-year terms for the CRT commissioners, staggered at two year intervals. This should eliminate any gaps in having a fully staffed agency.

5. Reconciles rotation of the chairmanship of the CRT with the staggered terms.

6. Permits paper, arbitration proceedings where appropriate.[3]

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[1] (1) Clear and convincing evidence and (2) evidence beyond a reasonable doubt are the only two other standards that exist, and the latter is applicable only to criminal proceedings.

[2] *Accord*, 37 C.F.R. §§301.82 and 301.83.

[3] This is the version that appears at Tab B, incorporating NPR's concerns.

7. Encourages settlements among the parties to all of the disparate proceedings by introducing elements of certainty and predictability.

Negative attributes: none known

S. 1346 WITH DEVOTIONAL CLAIMANTS' AMENDMENTS ADDRESSING NATIONAL PUBLIC RADIO'S CONCERNS

As you are aware, National Public Radio has submitted its comments on S. 1346 and has reworked that bill in the context of the transfer of functions to the Librarian. The Devotional Claimants share many of the concerns of NPR, particularly as they apply to fairness to the parties claimant. Certainly, S. 1346 as it would be amended by NPR is a huge improvement over S. 1346 as it is currently written. The NPR amendments, however, assume that the CRT will be abolished—which we hope is not the case. Starting with that premise, NPR grafts into S. 1346 certain protections to all claimants, most noticeably in the selection of arbitrators. It is, however, the concept of *ad hoc* arbitrators that is so disturbing. Why would any cable royalty claimant group ever settle if it thought it might get a better harvest from this year's crop of arbitrators, as distinguished from last year's crop?

In the House of Representatives one of the most prominent concerns was that the Tribunal did not have enough work to keep itself busy. Whatever truth there may have been to that in the past, it does not appear to be a justified concern today. In fact, the proposal for copyright royalty arbitration panels as proposed in S. 1346 could be an appropriate tool for the Tribunal at times when it must conduct so many proceedings simultaneously that it is physically impossible to churn out the necessary work unassisted. To that end, the Devotional Claimants have taken the suggestions advanced by NPR with respect to arbitration panels[4] and engrafted them into a second version of the Devotionals' Amendments to S. 1346, which appear here at Appendix B. They preserve the CRT, for all of the reasons set forth earlier, and provide the agency with the discretion to convene panels of arbitrators as the need may arise, *for determinations other than cable.* Cable royalties are, after all, the raison d'etre for the entire compulsory license scheme and must never be subject to determination by roving bands of *ad hoc* arbitrators. The concept of arbitrators as advanced by NPR and incorporated into the Devotional Claimants' proposed Amendments (at Appendix B) is wholly different from that presently contained in S. 1346 in that they are subject to review by the Tribunal whose job it will be to ensure that just results have been obtained, or substitute its determination for that of the arbitrators, and, along the way, procedural fairness is written into the statute.

Conclusion

I thank you for the opportunity of testifying and I thank your staff for the invitation to be here.

[COMMITTEE PRINT]

_____, 1993

(Page and line references are to S. 1346 as Reported by the Committee on the Judiciary)

AMENDMENTS TO S. 1346

Page 1, line 6, strike Section 2 in its entirety through Page 11, line 2 and insert the following:

Section 2. Copyright Royalty Tribunal: Establishment and Purpose——

(a) Section 801(b)(2) of title 17, United States Code, is amended to strike "in section 111," to strike in its entirety all after the colon in the first sentence and to insert in lieu thereof after the colon in the first sentence, the following:

> "(A) Petitions.—In accordance with subsection (B), any owner or user of a copyrighted work whose royalty rates are specified by this title, or by a rate established by the Copyright Royalty Tribunal, may file a petition with the Tribunal declaring that the petitioner requests an adjustment of the rate. The Tribunal shall make a determination as to whether the petitioner

[4] Devotional Claimants solve the problem of inappropriate acronyms; we refer to these bodies simply as "arbitration panels."

has a significant interest in the royalty rate in which an adjustment is requested. If the Tribunal determines that the petitioner has a significant interest, it shall cause notice of the determination, with the reasons therefor, to be published in the Federal Register, together with the notice of commencement of proceedings under this chapter. Except as provided in subsection (B)(1), the rates set shall attempt to reflect what the fair market value of the use would be in the absence of a compulsory license.

"(B) Types of Proceedings.——

"(1) Cable.—In making determinations concerning the adjustment of the copyright royalty rates in section 111, the Tribunal shall make its determinations only in accordance with the following provisions:

"(a) The rates established by section 111(d)(1)(B) may be adjusted to reflect national monetary inflation or deflation, or changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed on the date of the enactment of the Copyright Royalty Tribunal Reform Act of 1993, except that——

"(i) if the average rates charged cable system subscribers for the basic service of providing secondary transmissions are changed so that the average rates exceed national monetary inflation, no change in the rates established by section 111(d)(1)(B) shall be permitted; and

"(ii) no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber. The Tribunal may consider all factors relating to the maintenance of such level of payments including, as an extenuating factor, whether the cable industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

"(b) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(1)(B) may be adjusted to ensure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the Tribunal shall consider, among other factors, the economic impact on copyright owners and users, except that no adjustment in royalty rates shall be made under this subparagraph with respect to any distant signal equivalent or fraction thereof represented by——

"(i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or

"(ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

"(c) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

"(d) The gross receipts limitations established by section 111(d)(1)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section; and the royalty rate specified in such section shall not be subject to adjustment.

"(e) With respect to proceedings under subparagraph (a) or (d), petitions under subsection (a) may be filed during 1995 and in each subsequent fifth calendar year.

"(f) With respect to proceedings under subparagraph (b) or (c), petitions under subsection (A) may be filed within 12 months after an event described in either such subsection. Any change in royalty rates made pursuant to subparagraph (b) or (c) may be reconsidered in 1995 and each fifth calendar year thereafter, in accordance with subparagraph (b) or (c), as the case may be.

"(2) Phonorecords.—With respect to proceedings to adjust the copyright royalty rates in section 115, petitions under subsection (A) may be filed in 1997 and in each subsequent tenth calendar year.

"(3) Coin-Operated Phonorecord Players.—If a negotiated license authorized by section 116 is terminated or expires and is not replaced by another license agreement under such section, the Tribunal shall promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of non-dramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such rate or rate shall be the same as the last such rate or rates and shall remain in force until the conclusion of proceedings to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116(c).

"(4) Noncommercial Broadcasting.—The Tribunal may commence proceedings to adjust the copyright royalty rates in section 118 as provided in that section.

"(5) Digital Audio Recording.—The Tribunal shall make adjustments to royalty payments under section 1004(a)(3) as provided in that section."

(b) Section 801(b)(3) of title 17, United States Code, is amended to read as follows:

"to distribute royalty fees deposited with the Register of Copyrights under Sections 111(d)(4), 119(b)(4) and 1007, and to determine, in cases where controversy exists, the distribution of such fees."

(c) Section 801(c) of title 17, United States Code, is repealed.

(d) Section 802 of title 17, United States Code, is amended to read as follows:

Section 802. Membership of the tribunal

"(a) The Tribunal shall be composed of three Commissioners appointed by the President, by and with the advice and consent of the Senate. The term of office of any Commissioner who shall have been appointed by the President and confirmed by the Senate on or before July 1, 1992 shall expire January 1, 1997. The term of office of one individual appointed as Commissioner after July 1, 1993 shall expire January 1, 1999. The term of office of one individual appointed as Commissioner after July 1, 1993 shall expire January 1, 2001. Except with respect to the foregoing, the terms of office of individual Commissioners shall be six years. Any Commissioner may serve after the expiration of his or her term until a successor has been qualified. Any vacancy in the Tribunal shall not affect its powers and shall be filled, for the unexpired term of the appointment, by appointment by the President by and with the advice and consent of the Senate. Each Commissioner shall be compensated at the rate of pay in effect for level V of the Executive Schedule under Section 5316 of title 5.

"(b) On or after January 1, 1994, there shall be designated from among the Commissioners a chairman who shall serve for a term of one year, or until January 1, 1995, whichever is shorter.Thereafter, the most senior commissioner who has not previously served as chairman shall serve as chairman for a period of one year, except that if there are two commissioners who have not served a full term as chairman, the commissioner with the least amount of time remaining in his or her term as a commissioner shall be designated as chairman or if all commissioners have served a full term as chairman, the commissioner who has served the least number of terms as chairman shall be designated as chairman."

(e) Section 802(c) of title 17, United States Code, is repealed.

(f) Section 803 of title 17, United Stated Code, is amended to read as follows:

Section 803 Procedures of the tribunal

"(a) The Tribunal shall adopt regulations not inconsistent with law, governing its procedures and methods of operation. To the extent applicable and practicable, the Tribunal shall be guided by the Federal Rules of Civil Procedure and by the Federal Rules of Evidence. Except as otherwise pro-

vided in this chapter, the Tribunal shall be subject to the provisions of the Administrative Procedure Act (Title 5, United States Code, Chapter 5, subchapter II and Chapter 7).

"(b) Every final determination of the Tribunal shall be published in the Federal Register. It shall state in detail the criteria that the Tribunal determined to be applicable to the particular proceeding the various facts that it found relevant to its determination in that proceeding, and the specific reasons for its determination.

"(c) With respect to proceedings undertaken pursuant to Sections 115, 116, 118, 119 and/or 1004, the Tribunal may utilize arbitration panels, as follows:

"(1) An arbitration panel shall consist of 3 persons selected by the Tribunal pursuant to subsection (2).

"(2) Not later than 30 days after publication of a notice initiating an arbitration proceeding, the Tribunal shall select 2 panel members who are professional arbitrators or have otherwise demonstrated professional competence in formal or informal resolution of complex disputes. Such notice shall include the names and qualifications of potential panel members obtained from professional arbitration associations or such similar organizations as the Tribunal shall obtain and shall invite interested persons to comment in writing thereon. Within 15 days of date any such comments were due, the Tribunal shall announce its selection of the two panel members. The two panel members so selected shall, within 10 days after their selection, choose a third panel member using the same criteria, who shall serve as the chairperson of the panel. If such 2 panel members fail to agree upon the selection of a chairperson, the Tribunal shall promptly select the chairperson, using the same criteria.

"(3) Except as otherwise provided herein, arbitration proceedings shall be subject to the provisions of the Administrative Procedure Act. Arbitration panels shall conduct all proceedings in accordance with such procedures as the Tribunal amy adopt, for the purpose of making their determinations in carrying out the purposes set forth in section 801. The arbitration panels shall act on the basis of a fully documented written record, relevant court decisions, prior decisions of the Copyright Royalty Tribunal and prior arbitration panel determinations. Any copyright owner or any interested copyright party who claims to be entitled to royalties may submit relevant information and proposals to the arbitration panels in proceedings applicable to such copyright owner or interested copyright party.

"(4) Not later than 180 days after publication of the notice initiating an arbitration proceeding, the arbitration panel conducting the proceeding shall report to the Tribunal its determination concerning the royalty fee or distribution of royalty fees, as the case may be. Such report shall be accompanied by the written record, shall set forth the facts and legal precedents that the arbitration panel found relevant to its determination, and shall be in compliance with the provisions of 5 U.S.C. Section 557 applicable to initial decisions.

"(5) Within 60 days after receiving the report of an arbitration panel under subsection (4), the Tribunal shall issue an Order adopting or rejecting the determination of the arbitration panel. If the Tribunal rejects the determination of the arbitration panel, the Tribunal shall, within 60 days thereof and after full examination of the record created in the arbitration proceeding, issue a further Order setting the royalty fee, rate or distribution of fees as the case may be. The Tribunal shall cause to be published in the Federal Register the determination of the arbitration panel, and the decision of the Tribunal (including the order or orders issued under the preceding sentence).

"(d) The entire cost of operation of the Tribunal shall be paid from the royalties it distributes. Not later than January 31 of each calendar year, the Tribunal shall announce the projected percentage of cost of Tribunal operation, based on past experience, expected change(s) in circumstances and/or development(s) in mission, attributable to each of the categories of royalties (including the costs of any rate adjustment proceedings) it distributes pursuant to proceedings conducted before it, which percentages shall total 100. The parties to the rate and/or distribution proceedings shall bear the entire cost thereof in proportion to the awards to which they are entitled. Payment thereof shall be as provided in Section 807.

Page 11, line 14, strike the semicolon and insert a period.
Page 11, line 15 through line 24, strike the entirety thereof.
Page 12, line 1, strike "(E)" and insert "(C)".
Page 12, line 16, strike "(i)".
Page 12, line 19 after the semicolon through line 24, strike the entirety thereof.

Page 12, line 25, strike "(E)" and insert "(D)".
Page 13, line 4, strike "Librarian of Congress" and insert "Copyright Royalty Tribunal".
Page 13, line 5, strike "803" and insert "801".
Page 13, lines 13 and 14, strike "Librarian of Congress" and insert "Copyright Royalty Tribunal".
Page 13, line 16 through line 18, strike the entirety thereof.
Page 13, line 19, strike "(II)".
Page 13, line 22 through line 24, strike the entirety thereof.
Page 13, line 25, strike "(F) and insert "(E)".
Page 14, line 6, strike "; and" and insert a period.
Page 14, line 7 through line 9, strike the entirety thereof.
Page 14, line 16 through line 24, strike the entirety thereof.
Page 14, line 25, strike "(D)".
Page 15, line 1 through line 6, strike the entirety thereof.
Page 15, line 7, strike "(iii)".
Page 15, line 7, strike "(C)" and insert "(B)".
Page 15, line 20 through line 21, strike ", after consultation with the Copyright Royalty Tribunal".
Page 15, line 25 through page 16, line 1, strike ", after consultation with the Copyright Royalty Tribunal".
Page 16, line 3 through Page 20, line 12, strike the entirety thereof.

Senator DECONCINI. Thank you, Mr. Midlen. We appreciate that confidence in our legislative skills here. [Laughter.]

Mr. Damich?

Mr. MIDLEN. It was the House side that is the guilty party. [Laughter.]

Senator DECONCINI. I see.

STATEMENT OF EDWARD DAMICH, COMMISSIONER, COPYRIGHT ROYALTY TRIBUNAL, WASHINGTON, DC

Mr. DAMICH. Thank you, Mr. Chairman. My name is Edward J. Damich. I am a Commissioner of the Copyright Royalty Tribunal. Thank you for this opportunity to express my views on the Copyright Royalty Tribunal Reform Act of 1993, S. 1346.

This is the second time that I have testified before the subcommittee. The first was in 1989, when I testified in favor of the Visual Artists Rights Act that eventually became part of the Copyright Act. Assisting me is Tanya Sandros, a former legal intern at the Tribunal and a recent graduate of George Mason University Law School. Ms. Sandros prepared the charts that appear at the end of my testimony.

At the time of my appointment to the Tribunal I was a professor of law at George Mason University, where I taught copyright law, trade regulation, and trademark law. I have two graduate degrees from Columbia University and I have written extensively in the field of copyright. I have also had numerous speaking engagements on copyright law, both in this country and abroad.

Drawing upon my expertise in copyright law and my experience on the Tribunal, I have come to the conclusion that the Copyright Royalty Tribunal is an unnecessary Federal agency that should be abolished. Thus I support the enactment of the Copyright Royalty Tribunal Reform Act of 1993. In doing so, I also reflect the opinion of the majority of the Copyright Royalty Tribunal.

Senate bill 1346 deals with the two major deficiencies of the Tribunal: one, its episodic workload, and two, the Commissioners' lack of expertise.

On paper, the Tribunal would appear to be very busy. Its two main functions are rate adjustment and royalty distribution. It is involved in rate adjustments for the mechanical, jukebox, public broadcasting, cable, and satellite compulsory licenses and for digital audio recording technology under the Audio Home Recording Act, or AHRA. It distributes royalties under the cable and satellite compulsory licenses and for digital audio recording technology under AHRA.

A closer look, however, reveals that the Tribunal is not so very busy after all. I would like to draw your attention to the summary of the Tribunal's activity from its inception up to April 1993, which is contained in the charts at the end of my testimony. The charts on pages 20 and 21 are by calendar year; the charts on pages 22 and 23 are by proceeding year. "Evidentiary Hearing" means a trial-like proceeding with the introduction of testimony by the parties. "Formal Meeting" means any meeting of the Commissioners, including oral hearings. I want to emphasize, then, that in the chart with formal meetings, this includes times when the Tribunal formally met to make decisions, so I am not basing my judgments simply on evidentiary trial-like hearings, but on other types of activities done by the Tribunal.

Some of these meetings last merely one-half of an hour. In many instances, the charts assume a formal meeting, even when one is not indicated in The Federal Register, so that it is over- inclusive rather than under-inclusive.

In evaluating the ratesetting activities of the Tribunal, it should be kept in mind that, one, the jukebox license is suspended; two, the satellite rate is initially set by an arbitration panel; three, rate adjustments for the remaining licenses do not occur every year; and four, even when they do occur, they hardly ever involve evidentiary hearings.

Royalty distribution is limited to the satellite license, the cable license, and under AHRA. As yet, the Tribunal has had no evidentiary hearings regarding distribution under the AHRA. To date, the Tribunal has never held an evidentiary hearing for distribution of satellite royalties.

The history of the Tribunal's activity reveals that the only regular, significant work of the Tribunal is cable royalty distribution. It is the only real jewel in the Tribunal's otherwise rhinestone crown. Even so, over a period of 15 years—i.e., from the inception of the license in 1978 up to and including 1992—the Tribunal has had an average of only 20 evidentiary hearing days per year. In some years there were no evidentiary hearings, and about half the time the parties settled.

My own experience supports the accuracy of this history of the Tribunal's inactivity. In the first year of my term on the Tribunal there were zero evidentiary hearings, i.e., no evidentiary hearings for any of the licenses.

The second major deficiency of the Tribunal is that in the history of the Tribunal, by and large, the presidents of both parties have not appointed to the Tribunal persons with expertise in law and in copyright or communications. Commissioner Goodman and I, I believe, for the first time constitute a majority of the Tribunal with expertise in law, copyright and communications.

The Copyright Act of 1976 envisioned a Tribunal composed of experts in the field who would take a "hands on" approach to their work, with only a clerical staff for support. In 1985, the Tribunal's own statement before this subcommittee acknowledged that this had not been done and proposed the addition of a General Counsel to improve the quality of its decisions. Paradoxically, the 1985 solution for the inefficiency of the Tribunal was to add yet another person to the Federal payroll to do the job of the Commissioners.

Senate bill 1346 addresses these two major deficiencies. Recognizing the episodic workload of the Tribunal, it provides for arbitration panels to be established as needed.

There is a concern regarding the fitness of arbitration panels for multi-party disputes. In an article in the Iowa Law Review, Professor Stipanowich makes this statement:

> No reason exists to believe that a qualified panel of arbitrators would be any less capable than a judge or jury at sorting out intertwined contractual relationships among multiple parties.

It removes the arbitrators from the political appointment process, thus increasing the chances that qualified, experienced persons will be conducting the hearings and making the decisions.

In addition, S. 1346 preserves continuity and enhances the chances of settlement by requiring the arbitration panels to act on the basis of "prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress." Settlement is also increased by making the parties bear the entire cost of the proceeding, but the bill allows the arbitration panel to take into account the more limited resources of the smaller parties by setting the proportions of the cost each party should pay.

The American people have heard a lot of words from both parties about downsizing and "reinventing Government," but there have been few deeds. Eliminating the Copyright Royalty Tribunal will not save the taxpayers a large sum of money, nor will it eliminate a vast Federal bureaucracy, although parenthetically I might take exception to the estimate of the Library of Congress. I believe that one full-time lawyer and one full-time administrator with clerical assistance would be sufficient. But it will have important symbolic and precedential value. If Congress cannot even abolish the Copyright Royalty Tribunal, what hope have we that it will be able to muster the courage to tackle bigger projects?

The time to act on S. 1346 is now. The majority of the Tribunal supports its abolition. In a few months, the Tribunal may have other Commissioners who, having obtained the benefit of a 7-year term, might find it difficult to distinguish their personal interests from the public interest. By contrast, Commissioner Goodman and I do not expect to remain on the Tribunal beyond this year. We believe that this makes it easier for us to be objective.

In my considered judgment, S. 1346 provides a mechanism for rate and royalty adjudication that is cheaper and more efficient than a full-blown Federal agency.

Thank you, Mr. Chairman.

[Mr. Damich submitted the following:]

PREPARED STATEMENT OF EDWARD J. DAMICH ON BEHALF OF THE COPYRIGHT ROYALTY TRIBUNAL

Mr. Chairman, my name is Edward J. Damich. I am a Commissioner of the Copyright Royalty Tribunal. Thank you for the opportunity to express my views on the Copyright Royalty Tribunal Reform Act of 1993 (S. 1346). This is the second time that I have testified before the Subcommittee. The first was in 1989, when I testified in favor of the Visual Artists Rights Act that eventually became part of the Copyright Act. Assisting me is Tanya Sandros, a former legal intern at the Tribunal and a recent graduate of George Mason University Law School. Ms. Sandros prepared the charts that appear at the end of my testimony.

At the time of my appointment to the Tribunal, I was a Professor of Law at George Mason University, where I taught Copyright Law, Trade Regulation, and Trademark Law. I have two graduate degrees in law from Columbia University, and I have written extensively in the field of copyright. I have also had numerous speaking engagements on copyright law both in this country and abroad.

Drawing upon my expertise in copyright law and my experience on the Tribunal, I have come to the conclusion that the Copyright Royalty Tribunal is an unnecessary federal agency that should be abolished. Thus, I support the enactment of the Copyright Royalty Tribunal Reform Act of 1993. In doing so, I also reflect the opinion of the majority of the Copyright Royalty Tribunal.

Senate bill 1346 deals with the two major deficiencies of the Tribunal: (1) its episodic workload and (2) the Commissioners' lack of expertise.

On paper the Tribunal would appear to be very busy. Its two main functions are rate adjustment and royalty distribution. It is involved in rate adjustments for the mechanical, jukebox, public broadcasting, cable, and satellite compulsory licenses and for digital audio recording technology under the Audio Home Recording Act (AHRA). It distributes royalties under the cable and satellite compulsory licenses and for digital audio recording technology under AHRA.

A closer look, however, reveals that the Tribunal is not so very busy after all. I would like to draw your attention to the summary of the Tribunal's activity from its inception up to April 1993, which is contained in the charts at the end of my testimony. The charts on pages 20 and 21 are by calendar year; the charts on pages 22 and 23 are by proceeding year. "Evidentiary Hearing" means a trial-like proceeding with the introduction of testimony by the parties."Formal Meeting" means any meeting of the Commissioners,including oral hearings. Some of these meetings last merely a half of an hour. In many instances, it assumes a formal meeting even when one is not indicated in the *Federal Register,* so that it is over-inclusive rather than under-inclusive.

In evaluating the rate setting activities of the Tribunal, it should be kept-in mind that: (1) the jukebox license is suspended; (2)the satellite rate is initially set by an arbitration panel; (3)rate adjustments for the remaining licenses do not occur every year; and (4) even when they do occur, they hardly ever involve evidentiary hearings.

Royalty distribution is limited to the satellite license, the cable license, and under AHRA. As yet, the Tribunal has had no evidentiary hearings regarding distribution under the AHRA.[1] To date, the Tribunal has never held an evidentiary hearing for distribution of satellite royalties.

The history of the Tribunal's activity reveals that the only regular, significant work of the Tribunal is cable royalty distribution. It is the only real jewel in the Tribunal's otherwise rhinestone crown. Even so, over a period of 15 years, i.e.from the inception of the license in 1978 up to and including 1992, the Tribunal has had an average of only 20 evidentiary hearing days per year. In some years, there were no evidentiary hearings[2], and about half the time the parties settled.

My own experience supports the accuracy of this history of the Tribunal's inactivity. In the first year of my term on the Tribunal (beginning September 3, 1992), there were zero evidentiary hearings, i.e. no evidentiary hearings for any of the licenses.

The second major deficiency of the Tribunal is that in the history of the Tribunal, by and large the Presidents of bothparties have not appointed to the Tribunal persons with expertise in law and in copyright or communications. Commissioner Goodman and I, I believe, for the first time constitute a majority of the Tribunal with expertise in law, copyright and communications.

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[1] The Tribunal, however, has established a procedural schedule that sets January 10, 1994 as the first evidentiary hearing date.

[2] 1978, 1979, 1988.

The Copyright Act of 1976 envisioned a Tribunal composed of experts in the field who would take a "hands on" approach to their work with only a clerical staff for support.[3] In 1985, the Tribunal's own statement before this Subcommittee acknowledged that this had not been done and proposed the addition of a General Counsel to improve the quality of its decisions.[4] Paradoxically, the 1985 solution for the inefficiency of the Tribunal was to add yet another person to the federal payroll to do the job of the Commissioners.[5]

S. 1346 addresses these two major deficiencies. Recognizing the episodic workload of the Tribunal, it provides for arbitration panels to be established as needed. It removes the arbitrators from the political appointment process, thus increasing the chances that qualified, experienced persons will be conducting the hearings and making the decisions.[6]

In addition, S. 1346 preserves continuity and enhances the chances of settlement by requiring the arbitration panels to act on the basis of "prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress." Settlement is also increased by making the parties bear the entire cost of the proceeding, but the bill allows the arbitration panel to take into account the more limited resources of the smaller parties by setting the proportions of the cost each party should pay.

The American people have heard a lot of words from both parties about downsizing and "reinventing" government, but there have been few deeds. Eliminating the Copyright Royalty Tribunal will not save the taxpayers a large some of money nor will it eliminate a vast federal bureaucracy, but it will have important symbolic and precedential value. If Congress cannot even abolish the Copyright Royalty Tribunal, what hope have we that it will be able to muster the courage to tackle bigger projects?

The time to act on S. 1346 is now. The majority of the Tribunal supports its abolition. In a few months, the Tribunal may have other Commissioners who, having obtained the benefit of a seven-year term, might find it difficult to distinguish their personal interests from the public interest. By contrast, Commissioner Goodman and I do not expect to remain on the Tribunal beyond this year. We believe that this makes it easier to be objective. In my considered judgment, S. 1346 provides a mechanism for rate and royalty adjudication that is cheaper and more efficient than a full-blown federal agency.

Thank you.

FOREWORD

This report was prepared by Tanya M. Sandros, legal intern at the Copyright Royalty Tribunal at the request of Commissioner Edward J. Damich. The charts were compiled exclusively from information found in the *Federal Register*. The purpose of this report is to give as accurate a picture as possible of the amount of time actually spent by the Commissioners in the exercise of their official duties. Therefore, some *Federal Register* entries that were mere formalities were omitted from the charts. These include notices to ascertain whether a controversy exists, notices of

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[3] The [Tribunal] is authorized to appoint a staff to assist in carrying out its responsibilities. However, it is expected that the staff will consist only of sufficient clerical personnel to provide one full time secretary for each member and one or two additional employees to meet the clerical needs of the entire [Tribunal]. Members of the [Tribunal] are expected to perform all professional responsibilities themselves, except where it is necessary to employ outside experts on a consulting basis. Assistance in matters of administration, such as payroll and budgeting, will be available from the Library of Congress.

The Committee expects that the President shall appoint members of the [Tribunal] from among persons who have demonstrated professional competence in the field of copyright policy.

Copyright Law Revision (S. 22), H.R. Rept. 94–1476, 94th Cong., 2d Sess., pp. 174–175. At the time of the Report, the Tribunal was called the "Copyright Royalty Commission." For clarity, I have substituted "Tribunal" for "Commission."

[4] The Tribunal would be less than candid, however, if it did not acknowledge the criticism addressed by the courts to the quality of its final determinations. At times, they have been imprecise in expressing the connection between the record evidence and the ultimate decision. With the addition of a general counsel, the Tribunal will improve the quality of its decisions.

Statement of the Copyright Royalty Tribunal, July 11, 1985, p. 18.

[5] It is also worth noting that in holding adjudicatory hearings the Commissioners function like administrative law judges, who ordinarily are required to have been members of the Bar for seven years and to have seven years experience in administrative law or litigation.

[6] Although the Librarian of Congress is involved in the process and he is a political appointee, it should be noted that he may reject the arbitration panel's determination only if he finds it arbitrary and only upon recommendation of the Register of Copyrights.

partial distributions, notices of Sunshine Act Meetings, and notices of proposed rulemaking. None of this ordinarily involve serious or lengthy deliberations. Other entries that could conceivably be classified as mere formalities were retained, such as declarations that a controversy exists, since they provided benchmarks for the beginning of a proceeding.

Just as the inclusion of all *Federal Register* entries would give a misleading impression of the Commissioners' workload, relying exclusively on such entries underestimates the Commissioners' workload because it does not reflect the amount of time spent in informal discussions, in reading briefs, reviewing General Counsel work product and, in the case of some Commissioners, in drafting opinions. Unfortunately, however, there is no formal record of such activities. Therefore, the reader should figure in a reasonable amount of time during the pendency of a proceeding for such activities.

Perhaps the most useful part of the report are the charts at the end that summarize Tribunal activity. The reader should bear in mind that "evidentiary hearings" mean full-blown hearings where witnesses testify and are subject to cross-examination. "Formal meetings" include all oral hearings and all meetings express or implied from *Federal Register* entries. If anything, the report is over-inclusive in this respect. In 1992, for example, the "Total Formal Meetings and Evidentiary Hearing Days Per License Per Year" chart lists 7 for satellite. Turning to the 1992 chart, we see that there are 8 entries for satellite. This is because the March 1, 1992 entry is merely to acknowledge receipt of the arbitration report and, therefore, was not a meeting. On the other hand, the December 30, 1992 "final determination" was counted as a formal meeting, because it could have entailed a meeting, when, in actual fact, the final determination was agreed upon through a circulation of paper among the Commissioners and General Counsel. The actual method used, of course, was not reflected in the *Federal Register,* but it was thought better to err in exaggerating the number of meetings rather than in underestimating them.

EDWARD J. DAMICH,
Commissioner,
Copyright Royalty Tribunal.

TOTAL FORMAL MEETINGS AND EVIDENTIARY HEARING DAYS PER LICENSE PER YEAR

YEAR*	CABLE	JUKEBOX	MECHANICAL	PB	SATELLITE	TOTAL
1993	1	0	0	1	0	2
1992	2	0	0	5	7	14
1991	38	0	1	1	4	44
1990	15	3	0	1	0	19
1989	24	2	1	1	2	30
1988	3	8	0	1	0	12
1987	10	12	3	4	0	29
1986	30	8	0	1	0	39
1985	59	9	0	1	0	69
1984	18	2	0	1	0	21
1983	9	1	0	3	0	13
1982	78	4	0	5	0	87
1981	49	9	5	1	0	64
1980	27	11	52	1	0	91
1979	1	0	0	1	0	2
1978	0	0	0	12	0	12
TOTAL	364	69	62	40	13	548

* Calendar year
NOTE DART - 2 days of formal meetings in 1993

TOTAL EVIDENTIARY HEARING DAYS PER LICENSE PER YEAR

YEAR*	CABLE	JUKEBOX	MECHANICAL	PB	SATELLITE	TOTAL
1993	0	0	0	0	0	0
1992	0	0	0	0	0	0
1991	35	0	0	0	0	35
1990	6	0	0	0	0	6
1989	17	0	0	0	0	17
1988	0	4	0	0	0	4
1987	6	6	0	1	0	13
1986	25	4	0	0	0	29
1985	53	4	0	0	0	57
1984	16	0	0	0	0	16
1983	6	0	0	0	0	6
1982	72	0	0	2	0	74
1981	42	6	0	0	0	48
1980	21	7	47	0	0	75
1979	0	0	0	0	0	0
1978	0	0	0	10	0	10
TOTAL	299	31	47	13	0	390

* Calendar year

TOTAL FORMAL MEETINGS AND EVIDENTIARY HEARING DAYS PER PROCEEDING

YEAR*	CABLE		JUKEBOX		MECHANICAL	PB
	DIST	RATE	DIST	RATE	RATE	RATE
1993	0	0	0	0	0	1
1992	0	0	0	0	0	5
1991	0	0	0	0	1	1
1990	1	8	0	2	0	1
1989	40	0	1	0	1	1
1988	2	0	1	0	0	1
1987	17	0	2	0	3	4
1986	13	0	9	1	0	1
1985	10	1	11	0	0	1
1984	16	0	7	0	0	1
1983	72	0	9	0	0	3
1982	12	0	2	0	0	5
1981	9	29	2	0	4	1
1980	46	20	2	11	53	1
1979	60	0	9	0	0	1
1978	8	0	Settled	0	0	12
TOTAL	306	58	55	14	62	40

* Year DIST fund collected or year rate set

NOTE SATELLITE - 13 days of formal meetings 7 days in 1992, 4 days in 1991, and 2 days in 1989
DART - 2 days of formal meetings in 1993

TOTAL EVIDENTIARY HEARING DAYS PER PROCEEDING

YEAR*	CABLE		JUKEBOX		MECHANICAL	PB
	DIST	RATE	DIST	RATE	RATE	RATE
1993	0	0	0	0	0	0
1992	0	0	0	0	0	0
1991	0	0	0	0	0	0
1990	0	4	0	0	0	0
1989	35	0	Settled	0	0	0
1988	Settled	0	Settled	0	0	0
1987	11	0	Settled	0	PH**	1
1986	8	0	4	0	0	0
1985	6	0	6	0	0	0
1984	13	0	4	0	0	0
1983	65	0	4	0	0	0
1982	9	0	PH	0	0	2
1981	6	24	PH	0	0	0
1980	43	18	PH	7	47	0
1979	54	0	6	0	0	0
1978	3	0	Settled	0	0	10
TOTAL	253	46	24	7	47	13

* Year DIST fund collected or year rate set

** PH = paper hearing

NOTE. SATELLITE - no evidentiary hearing days since its inception in 1989

DART - Evidentiary hearings may occur in 1993 if a controversy exists over the 1992 DIST fund

Senator DECONCINI. Thank you very much, Professor Damich.

You have been a law professor, and now a Commissioner on the CRT. Mr. Midlen pointed out a number of things, and I presume they are in his statement—Mr. Midlen, the specifics of your concern about evidentiary questions and review and appeals?

Mr. MIDLEN. Yes.

Senator DECONCINI. I want to know if you could comment on those, Mr. Damich, or if you would rather look at the record and submit it to us. Mr. Midlen raises some interesting points, and I appreciate his testimony and his offer of corrective amendments for that.

But do you care to comment now, or would you rather do that——

Mr. DAMICH. I can briefly comment now, subject to a fuller response in writing.

As you have indicated or implied, I have not seen the statement of Mr. Midlen until this morning. Of course, I listened to his oral presentation.

One point of confusion for me is the question about the dominance of the larger parties with regard to the arbitration panel. Perhaps he could explain that more fully. My reading of the bill indicates that the Librarian of Congress is supposed to choose two of the arbitrators from a list supplied by the parties, presumably meaning all of the parties. I don't see why there is any reason to believe the Librarian of Congress would chose the representatives of the bigger parties as opposed to the smaller parties.

The other question, about costs and settlement, I think I have addressed in my written statement. I think there actually are incentives to settlement, and I believe the ability of the arbitration panel to apportion costs among the parties actually is in favor of the smaller parties. But perhaps Mr. Midlen could clarify, either now, or if there is no time, I could read his statement of reply in writing.

Senator DECONCINI. Yes.

Mr. Midlen, if you would like to clarify that in writing for the committee, I would welcome it.

Senator DECONCINI. I am going to have to go. We have a vote on right now.

I particularly think it is quite unusual, having served here 17 years, to have two Commissioners of a standing agency testify for the agency's elimination. I've been trying to eliminate the Administrative Conference for years, and it's hard to believe, the lobbying and the pressure to maintain that. Here we have the majority of the Commission testifying for it.

Ms. Daub, I just have one quick question before I leave. Your concern is of great interest to me, about the politicization of the Copyright Compulsory License Administration and Adjudication. You indicated in your testimony that the Librarian's selection of arbitrators will politicize the arbitration process because he is a political appointee. Well, of course, you are a political appointee, as are the other Commissioners, so how do you resolve that? The Librarian has been appointed and stayed; in the 17 years I've been here, the Librarian has never been reappointed, and we've had four

Presidents that could have changed it. So if any office is nonpolitical, it's the Librarian of Congress.

Ms. DAUB. Mr. Chairman, as a matter of fact, my oral presentation did not state "political appointee." It must have been in there, and I have taken that phrase out of my oral presentation but apparently have not done so in the written testimony.

Senator DECONCINI. So you would withdraw that statement?

Ms. DAUB. I would like to omit that.

Senator DECONCINI. I appreciate that candidness, because I really didn't think that made a good point. You did raise some very good points.

Mr. Goodman, you indicate there have been no hearings in 20 months?

Mr. GOODMAN. I certainly did testify that in the first 12 months that I was on the Tribunal, there were no hearings.

Senator DECONCINI. How do you explain that? In 1 minute, because I have to leave. [Laughter.]

Mr. GOODMAN. It is relatively——

Senator DECONCINI. Or would you submit that for the record if you can't do it in 1 minute?

Mr. GOODMAN. I'd be glad to do both. One minute is plenty of time to explain no hearings.

Not only was there a settlement, but that's not particularly a material issue. Essentially, the only hearings the Tribunal ever has is in the copyright and the cable copyright area. We have begun one now. That's about once a year. If they settle, there may very well be no hearings that year.

Senator DECONCINI. So that's the main area of what the Tribunal does now, is in the cable area?

Mr. GOODMAN. That is the main area.

Senator DECONCINI. Because I have to leave, we're going to conclude the hearing. If any of the witnesses want to submit supplemental statements or clarifications, we will leave the record open for 2 weeks to receive those.

Thank you very much.

[Whereupon, at 11:25 a.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

PROPOSED LEGISLATION

II

103D CONGRESS
1ST SESSION

S. 1346

To amend title 17, United States Code, to establish copyright arbitration royalty panels to replace the Copyright Royalty Tribunal, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 3 (legislative day, JUNE 30), 1993

Mr. DECONCINI (for himself and Mr. HATCH) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 17, United States Code, to establish copyright arbitration royalty panels to replace the Copyright Royalty Tribunal, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Royalty Tribunal Reform Act of 1993".

SEC. 2. COPYRIGHT ARBITRATION ROYALTY PANELS.

(a) ESTABLISHMENT AND PURPOSE.—Section 801 of title 17, United States Code, is amended as follows:

(1) The section heading is amended to read as follows:

"§ 801. Copyright arbitration royalty panels: establishment and purpose";

(2) Subsection (a) is amended to read as follows:

"(a) ESTABLISHMENT.—The Librarian of Congress, upon the recommendation of the Register of Copyrights, is authorized to appoint and convene copyright arbitration royalty panels.";

(3) Subsection (b) is amended—

(A) by inserting "PURPOSES.—" after "(b)";

(B) in the matter preceding paragraph (1), by striking "Tribunal" and inserting "copyright arbitration royalty panels";

(C) in paragraph (2)—

(i) in subparagraph (A), by striking "Commission" and inserting "copyright arbitration royalty panels"; and

(ii) in subparagraph (B), by striking "Copyright Royalty Tribunal" and inserting "copyright arbitration royalty panels";

(D) in paragraph (3), by striking "In determining" and all that follows through the end of the paragraph; and

(4) by amending subsection (c) to read as follows:

"(c) RULINGS.—The Librarian of Congress, upon the recommendation of the Register of Copyrights, may, before a copyright arbitration royalty panel is convened, make any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by such panel.".

(b) MEMBERSHIP AND PROCEEDINGS.—Section 802 of title 17, United States Code, is amended to read as follows:

"§ 802. Membership and proceedings of copyright arbitration royalty panels

"(a) COMPOSITION OF COPYRIGHT ARBITRATION ROYALTY PANELS.—A copyright arbitration royalty panel shall consist of 3 arbitrators selected by the Librarian of Congress pursuant to subsection (b).

"(b) SELECTION OF ARBITRATION PANEL.—Not later than 10 days after publication of a notice initiating an arbitration proceeding under section 803 or 804, and in accordance with procedures specified by the Register of Copyrights, the Librarian of Congress shall, upon the recommendation of the Register of Copyrights, select 2 ar-

bitrators from lists of arbitrators provided to the Librarian by parties participating in the arbitration. The 2 arbitrators so selected shall, within 10 days after their selection, choose a third arbitrator from the same lists, who shall serve as the chairperson of the arbitrators. If such 2 arbitrators fail to agree upon the selection of a chairperson, the Librarian of Congress shall promptly select the chairperson.

"(c) ARBITRATION PROCEEDINGS.—Copyright arbitration royalty panels shall conduct arbitration proceedings, in accordance with such procedures as they may adopt, for the purpose of making their determinations in carrying out the purposes set forth in section 801. The arbitration panels shall act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(b). Any copyright owner who claims to be entitled to royalties under section 111 or 119 or any interested copyright party who claims to be entitled to royalties under section 1006 may submit relevant information and proposals to the arbitration panels in proceedings applicable to such copyright owner or interested copyright party. The parties to the proceedings shall bear the entire cost

thereof in such manner and proportion as the arbitration panels shall direct.

"(d) REPORT TO THE LIBRARIAN OF CONGRESS.—Not later than 180 days after publication of the notice initiating an arbitration proceeding, the copyright arbitration royalty panel conducting the proceeding shall report to the Librarian of Congress its determination concerning the royalty fee or distribution of royalty fees, as the case may be. Such report shall be accompanied by the written record, and shall set forth the facts that the arbitration panel found relevant to its determination.

"(e) ACTION BY LIBRARIAN OF CONGRESS.—Within 60 days after receiving the report of a copyright arbitration royalty panel under subsection (d), the Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt or reject the determination of the arbitration panel. The Librarian shall adopt the determination of the arbitration panel unless the Librarian finds that the determination is arbitrary. If the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be. The Librarian shall cause to be published in the Federal Register the

determination of the arbitration panel, and the decision of the Librarian (including an order issued under the preceding sentence). The Librarian shall also publicize such determination and decision in such other manner as the Librarian considers appropriate. The Librarian shall also make the report of the arbitration panel and the accompanying record available for public inspection and copying.

"(f) JUDICIAL REVIEW.—Any decision of the Librarian of Congress under subsection (e) with respect to a determination of an arbitration panel may be appealed, by any aggrieved party who would be bound by the determination, to the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the publication of the decision in the Federal Register. The pendency of an appeal under this paragraph shall not relieve persons obligated to make royalty payments under sections 111, 119, or 1003 who would be affected by the determination on appeal to deposit the statement of account and royalty fees specified in those sections. The court shall have jurisdiction to modify or vacate a decision of the Librarian only if it finds, on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner. If the court modifies the decision of the Librarian, the court shall have jurisdiction to enter its own determination with respect to the amount or distribution of roy-

alty fees and costs, to order the repayment of any excess fees, and to order the payment of any underpaid fees, and the interest pertaining respectively thereto, in accordance with its final judgment. The court may further vacate the decision of the arbitration panel and remand the case for arbitration proceedings in accordance with subsection (c).".

(c) ADJUSTMENT OF COMPULSORY LICENSE RATES.—Section 803 of title 17, United States Code, and the item relating to such section in the table of sections at the beginning of chapter 8 of such title, are repealed.

(d) INSTITUTION AND CONCLUSION OF PROCEEDINGS.—Section 804 of title 17, United States Code, is amended as follows:

(1) Subsection (a) is amended—

(A) by repealing paragraph (1); and

(B) in paragraph (2)—

(i) in the matter preceding subparagraph (A) by striking "Tribunal," and all that follows through "proceedings under this chapter." and inserting "Copyright Royalty Tribunal before the date of the enactment of the Copyright Royalty Tribunal Reform Act of 1993, or by a copyright arbitration royalty panel after such date of

enactment, may file a petition with the Librarian of Congress declaring that the petitioner requests an adjustment of the rate. The Librarian of Congress shall, upon the recommendation of the Register of Copyrights, make a determination as to whether the petitioner has such a significant interest in the royalty rate in which an adjustment is requested. If the Librarian determines that the petitioner has such a significant interest, the Librarian shall cause notice of this determination, with the reasons therefor, to be published in the Federal Register, together with the notice of commencement of proceedings under this chapter.";

(ii) in subparagraph (C)—

(I) in clause (i) by striking "in 1990 and in each subsequent tenth calendar year, and", and by striking "116A" and inserting "116"; and

(II) by amending clause (ii) to read as follows:

"(ii) If a negotiated license authorized by section 116 is terminated or expires and is not

replaced by another license agreement under such section, providing permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the 1-year period ending March 1, 1989, the Librarian of Congress shall, upon petition filed under subsection (a) within 1 year after such termination or expiration, convene a copyright arbitration royalty panel. The arbitration panel shall promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of non-dramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such rate or rates shall be the same as the last such rate or rates and shall remain in force until the conclusion of proceedings by the arbitration panel, in accordance with section 802, to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116(c).".

(2) Subsection (b) is amended—

(A) by striking "Tribunal" the first place it appears and inserting "Copyright Royalty Tribunal or the Librarian of Congress";

(B) by striking "Tribunal" the second and third places it appears and inserting "Librarian"; and

(C) by striking "Tribunal" the last place it appears and inserting "Copyright Royalty Tribunal or the Librarian of Congress".

(3) Subsection (c) is amended by striking "Tribunal" and inserting "Librarian of Congress".

(4) Subsection (d) is amended—

(A) by striking "Chairman of the Tribunal" and inserting "Librarian of Congress"; and

(B) by striking "determination by the Tribunal" and inserting "a determination".

(5) Subsection (e) is amended by striking "Tribunal" and inserting "Librarian of Congress".

(e) REPEAL.—Sections 805 through 810 of title 17, United States Code, and the items relating to such sections in the table of sections at the beginning of chapter 8 of such title, are repealed.

(f) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 8 of title 17, United States Code,

is amended by striking the items relating to sections 801 and 802 and inserting the following:

"Sec. 801. Copyright arbitration royalty panels: establishment and purpose.
"Sec. 802. Membership and proceedings of copyright arbitration royalty panels.".

SEC. 3. JUKEBOX LICENSES.

(a) REPEAL OF COMPULSORY LICENSE.—Section 116 of title 17, United States Code, and the item relating to section 116 in the table of sections at the beginning of chapter 1 of such title, are repealed.

(b) NEGOTIATED LICENSES.—(1) Section 116A of title 17, United States Code, is amended—

(A) by redesignating such section as section 116;

(B) by striking subsection (b) and redesignating subsections (c) and (d) as subsections (b) and (c), respectively;

(C) in subsection (b)(2) (as so redesignated) by striking "Copyright Royalty Tribunal" and inserting "Librarian of Congress";

(D) in subsection (c) (as so redesignated)—

(i) in the subsection caption by striking "ROYALTY TRIBUNAL" and inserting "ARBITRATION ROYALTY PANEL"; and

(ii) by striking "the Copyright Royalty Tribunal" and inserting "a copyright arbitration royalty panel"; and

(E) by striking subsections (e), (f), and (g).

(2) The table of sections at the beginning of chapter 1 of title 17, United States Code, is amended by striking "116A" and inserting "116".

SEC. 4. PUBLIC BROADCASTING COMPULSORY LICENSE.

Section 118 of title 17, United States Code, is amended—

(1) in subsection (b)—

(A) by striking the first 2 sentences;

(B) in the third sentenee by striking "works specified by this subsection" and inserting "published nondramatic musical works and published pictorial, graphic, and sculptural works";

(C) in paragraph (1)—

(i) in the first sentence by striking ", within one hundred and twenty days after publication of the notice specified in this subsection,"; and

(ii) by striking "Copyright Royalty Tribunal" each place it appears and inserting "Librarian of Congress";

(D) in paragraph (2) by striking "Tribunal" and inserting "Librarian of Congress";

(E) in paragraph (3)—

(i) by striking the first sentence and inserting the following: "In the absence of license agreements negotiated under paragraph (2), the Librarian of Congress shall, pursuant to section 803, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (2), shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether such copyright owners have submitted proposals to the Librarian of Congress.";

(ii) in the second sentence—

(I) by striking "Copyright Royalty Tribunal" and inserting "copyright arbitration royalty panel"; and

(II) by striking "clause (2) of this subsection" and inserting "paragraph (2)"; and

(iii) in the last sentence by striking "Copyright Royalty Tribunal" and inserting "Librarian of Congress"; and

(F) by striking paragraph (4);

(2) by striking subsection (c); and

(3) in subseetion (d)—

(A) by redesignating such subsection as subsection (c);

(B) by striking "to the transitional provisions of subsection (b)(4), and"; and

(C) by striking "Copyright Royalty Tribunal" and inserting "copyright arbitration royalty panel".

SEC. 5. SECONDARY TRANSMISSIONS BY SUPERSTATIONS AND NETWORK STATIONS FOR PRIVATE VIEWING.

Section 119 of title 17, United States Code, is amended—

(1) in subsection (b)—

(A) in paragraph (1) by striking ", after consultation with the Copyright Royalty Tribunal," each place it appears;

(B) in paragraph (2) by striking "Copyright Royalty Tribunal" and inserting "Librarian of Congress";

(C) in paragraph (3) by striking 'Copyright Royalty Tribunal" and inserting "Librarian of Congress"; and

(D) in paragraph (4)—

(i) by striking "Copyright Royalty Tribunal" each place it appears and inserting "Librarian of Congress";

(ii) by striking "Tribunal" each place it appears and inserting "Librarian of Congress"; and

(iii) in subparagraph (C) by striking "conduct a proceeding" in the last sentence and inserting "convene a copyright arbitration royalty panel"; and

(2) by striking subsection (c) and inserting the following:

"(c) DETERMINATION OF ROYALTIES.—The royalty fee payable under subsection (b)(1)(B) shall be that established by the Copyright Royalty Tribunal on May 1, 1992, as corrected on May 18, 1992.".

SEC. 6. CONFORMING AMENDMENTS.

(a) CABLE COMPULSORY LICENSE.—Section 111(d) of title 17, United States Code, is amended as follows:

(1) Paragraph (1) is amended by striking ", after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted),".

(2) Paragraph (1)(A) is amended by striking ", after consultation with the Copyright Royalty Tri-

bunal (if and when the Tribunal has been constituted),".

(3) Paragraph (2) is amended by striking the second and third sentences and by inserting the following: "All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution by the Librarian of Congress in the event no controversy over distribution exists, or by a copyright arbitration royalty panel in the event a controversy over such distribution exists. The Librarian shall compile and publish on a semiannual basis, a compilation of all statements of account covering the relevant 6-month period provided by paragraph (1) of this subsection.".

(4) Paragraph (4)(A) is amended—

(A) by striking "Copyright Royalty Tribunal" and inserting "Librarian of Congress"; and

(B) by striking "Tribunal" and inserting "Librarian of Congress".

(5) Paragraph (4)(B) is amended to read as follows:

"(B) After the first day of August of each year, the Librarian of Congress shall, upon the recommendation of the Register of Copyrights,

determine whether there exists a controversy concerning the distribution of royalty fees. If the Librarian determines that no such controversy exists, the Librarian shall, after deducting reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Librarian finds the existence of a controversy, the Librarian shall, pursuant to chapter 8 of this title, convene a copyright arbitration royalty panel to determine the distribution of royalty fees.".

(6) Paragraph (4)(C) is amended by striking "Copyright Royalty Tribunal" and inserting "Librarian of Congress".

(b) AUDIO HOME RECORDING ACT.—

(1) ROYALTY PAYMENTS.—Section 1004(a)(3) of title 17, United States Code, is amended—

(A) by striking "Copyright Royalty Tribunal" and inserting "Librarian of Congress"; and

(B) by striking "Tribunal" and inserting "Librarian of Congress".

(2) DEPOSIT OF ROYALTY PAYMENTS.—Section 1005 of title 17, United States Code, is amended by striking the last sentence.

(3) ENTITLEMENT TO ROYALTY PAYMENTS.—Section 1006(c) of title 17, United States Code, is amended by striking "Copyright Royalty Tribunal" and inserting "Librarian of Congress shall convene a copyright arbitration royalty panel which".

(4) PROCEDURES FOR DISTRIBUTING ROYALTY PAYMENTS.—Section 1007 of title 17, United States Code, is amended—

(A) in subsection (a)(1) by striking "Copyright Royalty Tribunal" and inserting "Librarian of Congress";

(B) in subsection (b)—

(i) by striking "Copyright Royalty Tribunal" and inserting "Librarian of Congress"; and

(ii) by striking "Tribunal" each place it appears and inserting "Librarian of Congress"; and

(C) in subsection (c)—

(i) by striking the first sentence and inserting "If the Librarian of Congress finds the existence of a controversy, the Li-

brarian shall, pursuant to chapter 8 of this title, convene a copyright arbitration royalty panel to determine the distribution of royalty payments."; and

(ii) by striking "Tribunal" each place it appears and inserting "Librarian of Congress".

(5) ARBITRATION OF CERTAIN DISPUTES.—Section 1010 of title 17, United States Code, is amended—

(A) in subsection (b)—

(i) by striking "Copyright Royalty Tribunal" and inserting "Librarian of Congress"; and

(ii) by striking "Tribunal" each place it appears and inserting "Librarian of Congress";

(B) in subsection (e) by striking "Copyright Royalty Tribunal" each place it appears and inserting "Librarian of Congress";

(C) in subsection (f)—

(i) by striking "Copyright Royalty Tribunal" each place it appears and inserting "Librarian of Congress";

(ii) by striking "Tribunal" each place it appears and inserting "Librarian of Congress"; and

(iii) in the third sentence by striking "its" and inserting "the Librarian's"; and

(D) in subsection (g)—

(i) by striking "Copyright Royalty Tribunal" and inserting "Librarian of Congress"; and

(ii) by striking "Tribunal" each place it appears and inserting "Librarian of Congress".

SEC. 7. EFFECTIVE DATE AND TERMINATION.

(a) IN GENERAL.—This Act and the amendments made by this Act shall take effect on January 1, 1994.

(b) EFFECTIVENESS OF EXISTING RATES AND DISTRIBUTIONS.—All royalty rates and all determinations with respect to the proportionate division of compulsory license fees among copyright claimants, whether made by the Copyright Royalty Tribunal, or by voluntary agreement, before the effective date set forth in subsection (a) shall remain in effect until modified by voluntary agreement or pursuant to the amendments made by this Act.

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